

Volume 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

JESSE PEREZ,)	
)	
Plaintiff,)	
)	
VS.)	No. C 13-5359 VC
)	
A. GATES, et al,)	
)	San Francisco, California
Defendants.)	Monday
)	November 16, 2015
)	8:00 a.m.

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

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PROCEEDINGS

P R O C E E D I N G S

November 16, 2015

8:23 a.m.

THE CLERK: Calling Case No. 13-5359, Perez v Gates,
et al.

Counsel, please state your appearances for the record.

MR. LEE: Good morning, your Honor. Randall Lee,
Matthew Benedetto and Katie Moran for Mr. Perez. Mr. Perez is
present.

THE COURT: Good morning.

MS. NYGAARD: Good morning. Jennifer Nygaard from
the Attorney General's office.

MR. SEALS: Good morning. Elliott Seals from the
Attorney General's Office.

MS. NYGAARD: For defendants.

MS. TUCAY: Good morning. Jocelyn Tucay from the
Attorney General's Office.

THE COURT: Good morning.

MR. BURRIS: Sean Burris, California Department of
Corrections.

THE COURT: Okay. You all don't need to make your
appearances.

MR. SEALS: Jocelyn is our paralegal. These are the
defendants.

THE COURT: I understand. Good morning, everybody.
So just a couple of quick questions. One question that

1 came to my mind that we hadn't talked about was because we're
2 phasing the trial in the way that we are, you know, there is
3 always a little bit of an issue about how to discuss that with
4 the jury without -- you know, you kind of want to avoid saying
5 outright: If you vote this way, you're going to be free to go;
6 and if you vote the other way, you're going to have to spend
7 some more time.

8 So I was going to kind of just avoid addressing that issue
9 and in terms of discussing how long the trial will last, just
10 say about a week. I think that probably would cover us.

11 My guess is that we may well be done -- based on the
12 witnesses you've identified, we may well be done with the
13 liability phase by Wednesday or possibly Friday; don't you
14 think?

15 **MR. LEE:** Your Honor, I -- I think that's right. I
16 think our only concern about the timing is that if we're facing
17 Friday afternoon and, you know, it's -- that there is a danger
18 it spills over into Thanksgiving week, you know, we're a little
19 worried about the dynamic that the Court just referred to;
20 that, you know, the jurors will feel incentivized to reach a
21 particular decision by Friday afternoon. And I don't know
22 that --

23 **THE COURT:** Well, I mean, I think that when we
24 discuss scheduling with them today, I want to make very clear
25 that there is -- you know, that there is significant

1 possibility it will go over to next week.

2 I'm going to suggest to them that they are going to be
3 done by the end of this week. I want everyone to have that
4 expectation.

5 **MR. LEE:** Thank you.

6 **THE COURT:** If we go to the damages phase, I also
7 assume that it will not take that much time.

8 **MR. LEE:** That's our anticipation.

9 **MS. NYGAARD:** Correct.

10 **THE COURT:** I can't imagine it being more than one
11 trial day's worth of evidence presentation.

12 **MR. LEE:** Less than that.

13 **THE COURT:** Okay. So I just want to make sure
14 everybody was on the same page about that.

15 I got your suggested edits of the case description. That
16 all looked fine. The only thing is, you know, nobody knows
17 what a gang validation is. Maybe you all have been living with
18 this case too long and you think everybody knows what a gang
19 validation is, but, you know, when I first saw that term, I
20 started scratching my head and got confused.

21 So I'm just using, like, something closer to regular
22 English to describe that, but otherwise your edits look fine.
23 Of course, you'll be able to explain to them what a gang
24 validation is during trial.

25 The expert is Subia? Is that the name of the expert?

1 **MR. LEE:** Yes.

2 **THE COURT:** I'm a little unclear. It may be just I
3 don't remember very well our prior discussions of Subia, but
4 I'm -- are you calling him as a percipient witness? As an
5 expert witness?

6 If you're calling him as an expert witness, you know, what
7 is there left to call him about after my ruling on the motion
8 in limine? I just wanted to get sort of clear what his
9 situation was.

10 **MR. BENEDETTO:** Yes, your Honor. We will be calling
11 him as an expert with respect to cell search procedures.

12 **THE COURT:** Okay.

13 **MR. BENEDETTO:** And that would be it.

14 **THE COURT:** Okay. And that's something that -- that
15 everybody agrees he's an expert on and can testify about?

16 **MR. BENEDETTO:** Yes, your Honor.

17 **MS. NYGAARD:** Yes.

18 **THE COURT:** All right. Are there any other
19 evidentiary issues that you anticipate coming up with whoever
20 your first or second witnesses are that we can begin to address
21 in advance?

22 **MR. BENEDETTO:** Our first witness will be Mr. Perez.
23 And we have the understanding that the defendants have objected
24 to a number of the exhibits that we plan to use with him.

25 **THE COURT:** All right.

1 **MS. NYGAARD:** That's correct.

2 **THE COURT:** Do I have an exhibit binder? Yeah, I do.

3 What I'm going to do is not hear argument about it now,
4 because I assume the prospective jurors are going to be ready
5 to come down pretty soon.

6 Kristen, if you find out what the ETA is, you can let me
7 know.

8 At a minimum, if you could just identify what the issues
9 are so we can start to look at it.

10 And this is something that you guys need to be really
11 conscientious about doing throughout the course of trial; that
12 is to say, doing your best to identify what potential
13 evidentiary issues could come up and front them in advance so
14 that we don't waste the jury's time bickering about them at
15 sidebar.

16 And you need to keep in mind that I am fairly
17 inexperienced in terms of presiding over trials, and so it will
18 be more important with me, than most judges, to front issues
19 with me in advance to avoid the -- to reduce the chances of
20 error. So with that in mind.

21 **MR. LEE:** Before we proceed on the exhibits, could I
22 just ask the Court if the court would ask the correctional
23 officers to remove Mr. Perez's arm restraints? They wanted to
24 hear it from you first.

25 **THE COURT:** Oh, yes. Certainly. Yes.

1 **MR. LEE:** And since we're on the topic of the
2 conditions for Mr. Perez, one other thing we wanted to ask.

3 Ordinarily, I understand that prisoners are only entitled
4 to a shower and shave three times a week, but we think in light
5 of the importance that Mr. Perez look presentable, that he have
6 the opportunity to shower and shave every day.

7 **THE COURT:** Yes. Do you need a written order on
8 that?

9 **THE SHERIFF:** Yes.

10 **THE COURT:** Okay. I will prepare a written order.
11 So it should just say that during the course of trial,
12 Mr. Perez must be permitted to shower and shave every day.

13 **MR. LEE:** Yes, please.

14 **MS. NYGAARD:** Your Honor, just for the record,
15 defendants would be objecting to that order. I don't know how
16 San Quentin's shower schedules are set up or anything. So for
17 on a daily basis, it might be too difficult. I just want to
18 note that for the record.

19 **THE COURT:** Objection noted.

20 And then Mr. Perez is going to be the first witness, so
21 that we -- we will take a -- if Mr. Perez is called today, we
22 will take a short break after opening statements to get him up
23 there outside the presence of the jury. All right?

24 **MR. BENEDETTO:** Right.

25 **MS. NYGAARD:** Great.

1 **THE COURT:** All right. Okay. What are your -- what
2 are the issues?

3 **MS. NYGAARD:** On Exhibit 2, defendants object to the
4 introduction of this exhibit, specifically the second page.
5 Perez 86, contains underlining, presumably made by Mr. Perez
6 himself, and we feel it's unduly prejudicial, leading the jury
7 to think that the things that are underlined are more important
8 or have some significance.

9 **THE COURT:** Okay, that's overruled.
10 Next?

11 **MS. NYGAARD:** No. 10.

12 **THE COURT:** Okay.

13 **MS. NYGAARD:** This is an article written by
14 Mr. Perez. Your Honor, defendants object to the admission of
15 this article because it contains --

16 **THE COURT:** Okay, hold on. First of all, it's -- in
17 my version of the binder I actually don't have that article in
18 here.

19 **MS. NYGAARD:** It's entitled "Opposition to Elements
20 of Proposed STG," No. 10.

21 **THE COURT:** Yeah. That didn't find its way into my
22 binder. I have a tab, Tab 10, but there is nothing in there.

23 (Whereupon, document was tendered to the Court.)

24 **THE COURT:** Kristen, what's the status of the jurors?

25 **THE CLERK:** I've asked for them. They should be on

1 their way down.

2 **THE COURT:** Sorry?

3 **THE CLERK:** I've asked for them. They should be on
4 their way down.

5 **THE COURT:** Okay. So, Exhibit 10. And the objection
6 is?

7 **MS. NYGAARD:** First of all, Rule 403. It would be
8 overly prejudicial to have this submitted to the jury. It
9 contains Mr. Perez's objections to policies the CDCR was
10 talking about implementing. He's very critical of the CDCR.

11 **THE COURT:** Is this a document that is alleged to
12 have been improperly confiscated?

13 **MS. NYGAARD:** No.

14 **MR. BENEDETTO:** It is. It was an article that was in
15 his cell that was not confiscated that is --

16 **THE COURT:** I'll think about that. We'll talk about
17 it at a break.

18 **MS. NYGAARD:** I have one more objection to that. It
19 also contains an impermissible legal conclusion. He talks
20 about how the procedures violate the Fifth Amendment and I just
21 don't feel it's appropriate to be submitted to a jury.

22 **THE COURT:** Okay.

23 **MR. BENEDETTO:** We wouldn't be offering it for its
24 contents.

25 **THE COURT:** We'll have a chance to talk about it

1 later. I just want to know what the objections are right now.

2 **MR. BENEDETTO:** 12.

3 **MS. NYGAARD:** No. 12 is the settlement agreement.

4 Defendants object on relevance. We are not -- defendants do
5 not disagree that there was no valid settlement agreement in
6 place. We feel that it's just not necessary for the jury to
7 actually see the written settlement agreement.

8 **THE COURT:** I just want to make sure that prospective
9 jurors haven't walked into the room. The two people who walked
10 in, are you -- you're not --

11 **MS. NYGAARD:** They are from the Attorney General's
12 Office.

13 **THE COURT:** Okay. Thank you.

14 **MS. NYGAARD:** Defendants also object that it would be
15 overly prejudicial because it contains, you know, the -- the
16 amount of the settlement, and it could be misleading to a jury
17 to kind of give them an idea of what they should award in this
18 case.

19 **THE COURT:** Okay. Any other objections?

20 **MS. NYGAARD:** Not to that document.

21 **THE COURT:** I mean, any more objections to exhibits?

22 **MS. NYGAARD:** Oh. Yes. What's the next one?

23 **MR. BENEDETTO:** 15.

24 **MS. NYGAARD:** 15. No. 15. It's a photograph of a
25 empty SHU cell.

1 **THE COURT:** Okay.

2 **MS. NYGAARD:** Defendants object to this in that it's
3 not representative of the cell -- Mr. Perez's cell, which is at
4 issue in this case looked like. The toilet or the sink that
5 you see on the right-hand side is actually on the left. Mr.
6 Perez's cell is kind of a mirror image of this one.

7 We also believe that it's overly prejudicial because it's
8 just a barren empty cell that, you know, would be overly
9 prejudicial to the jury to think that this is the conditions
10 that inmates live in. It's not representative.

11 **THE COURT:** Because the conditions they live in are a
12 mirror image of this picture as --

13 **MS. NYGAARD:** Mr. Perez's cell was a mirror image,
14 but we also object. There is no furnishings in here. I mean,
15 inmates personalize their cell. They have clothing. They
16 have, you know, two mattresses if there's two inmates. They
17 have bedding on it. This is just a barren, empty cell. It's
18 not representative.

19 **THE COURT:** All right. Any other exhibits?

20 **MR. BENEDETTO:** 17.

21 **MS. NYGAARD:** 17, again, is a photograph of a cell.
22 It's not the cell at issue in this case.

23 We also believe it would be overly prejudicial because it
24 shows some inmates in there that are not Mr. Perez or any of
25 his witnesses in this case.

1 **THE COURT:** Okay.

2 **MR. BENEDETTO:** 19.

3 **MS. NYGAARD:** 19. Object on the basis of relevance.

4 This is a hallway inside the Security Housing Unit; that
5 Mr. Perez would rarely ever be taken down this hallway. It has
6 no bearing on whether defendants retaliated. No relevance on
7 whether defendants retaliated.

8 And, again, we believe it's also danger of unfair
9 prejudice by misleading the jury to think that, you know,
10 Mr. Perez is brought down this hallway on a daily basis.

11 **THE COURT:** Okay.

12 **MS. NYGAARD:** Exhibit 20 is a photograph of a SHU
13 exercise yard. Again, defendants object on the basis of
14 relevance. This has nothing to do with whether defendants
15 retaliated or conspired to retaliate against Mr. Perez.

16 And the same goes -- the same goes for No. 21.

17 **THE COURT:** Okay.

18 **MS. NYGAARD:** Again, it's an exercise yard at the
19 SHU. We're not disputing that, but we don't believe there is
20 any relevance to the introduction of this exhibit. It has
21 nothing to do with whether defendants retaliated or conspired
22 to retaliate against him, and it could also be overly
23 prejudicial for the liability phase.

24 **MR. BENEDETTO:** 25.

25 **MS. NYGAARD:** No. 25. This is purported to be a

1 diagram of the SHU rotunda. It appears to be drawn by
2 Mr. Perez himself. The defendants object that -- lack of
3 authentication.

4 **THE COURT:** That is also missing from my binder.

5 (Whereupon document was tendered to the Court.)

6 **THE COURT:** Thanks. Okay.

7 **MS. NYGAARD:** First of all, authentication, lack of
8 -- like I said, it just appears to be a hand drawn --

9 **THE COURT:** Mr. Perez drew it. He can authenticate
10 it.

11 **MS. NYGAARD:** Also, relevance. It doesn't have any
12 bearing on whether defendants retaliate or conspired to
13 retaliate against Mr. Perez.

14 **THE COURT:** Okay.

15 **MS. NYGAARD:** And, also, that the -- under Rule 403,
16 that it could be confusing and misleading to the jury because
17 defendants believe that this is not a completely accurate
18 depiction of the rotunda and the SHU layout.

19 **THE COURT:** Okay.

20 **MR. BENEDETTO:** 26.

21 **MS. NYGAARD:** No. 26. Defendants object to this for
22 relevance. We don't -- we don't believe that this photograph
23 of a holding cell has anything to do with the relevance of this
24 case.

25 Also, for lack of authentication. It's -- we don't

1 believe that this is actually a photograph from the Security
2 Housing Unit or even Pelican Bay State Prison at all, so it
3 also has no relevance in this case.

4 **THE COURT:** Okay.

5 **MS. NYGAARD:** And under Rule 403 that the probative
6 value is substantially outweighed by unfair prejudice by having
7 the jurors see this holding cell when it has no relevance to
8 the case.

9 **THE COURT:** Okay.

10 **MS. NYGAARD:** And No. 66 -- excuse me. No. 65 --
11 (Discussion held off the record between counsel.)

12 **THE COURT:** Kristen, is the jury here now, do you
13 know?

14 **THE CLERK:** They are.

15 **THE COURT:** Are they waiting outside the door?

16 **THE CLERK:** I will go check.

17 **MS. NYGAARD:** We only have one more.

18 **THE COURT:** Okay.

19 **MS. NYGAARD:** No. 77, your Honor.

20 **THE COURT:** 77?

21 **MS. NYGAARD:** Yes.

22 **THE COURT:** Okay.

23 **MS. NYGAARD:** Defendants, again, object that this
24 exhibit is not relevant and would be unfairly prejudicial under
25 Rule 403. It also contains inadmissible character evidence

1 under Rule 404, and that it's also hearsay.

2 **MR. BENEDETTO:** I would note on 77, your Honor, you
3 had invited the defendants to draft a limiting instruction.

4 **THE COURT:** This is the one about -- from, like, a
5 year ago?

6 **MR. BENEDETTO:** Correct.

7 **MS. NYGAARD:** The Ellery email, correct, to Pimentel.

8 **THE COURT:** I was curious why --

9 **MR. BENEDETTO:** The defendants did not draft a
10 limiting instruction.

11 **THE COURT:** Okay. So, I mean, most of that -- most
12 of this stuff, my reaction is that it's sort of setting the
13 stage and to the extent -- there may be an authentication issue
14 with respect to Exhibit 26, but for the most part these seem
15 like setting-the-stage exhibits. I can't imagine there is
16 going to be much of a problem with them, but we can discuss
17 them further at a break.

18 So, meanwhile, I will go back behind the curtain until the
19 jury gets settled and we'll see you shortly.

20 **MR. BENEDETTO:** Thank you, your Honor.

21 **MS. NYGAARD:** Thank you.

22 (Brief pause.)

23 (Prospective Jurors enter the courtroom.)

24 **THE CLERK:** Calling Case No. 13-CV-5359, Perez v
25 Gates, et al.

1 **MR. LEE:** Good morning, your Honor. Randall Lee from
2 Wilmer Hale for plaintiff, Mr. Perez, who is present in court.

3 **MR. BENEDETTO:** Good morning, your Honor. Matthew
4 Benedetto from Wilmer Hale on behalf of Mr. Perez.

5 **MS. MORAN:** Good afternoon, your Honor. Katie Moran
6 on behalf of Mr. Perez.

7 **MS. NYGAARD:** Good morning, your Honor. Jennifer
8 Nygaard from the California Attorney General's Office
9 representing Defendants Burris, Gates, Gongora, Healy and
10 Pimentel, all present here in court.

11 **THE COURT:** Good morning.

12 **MR. SEALS:** Good morning, your Honor. Elliott Seals
13 from the Attorney General's Office, also representing the
14 defendants.

15 **THE COURT:** Good morning.

16 Good morning. Good morning, everybody. Thank you very
17 much for coming. My name is Vince Chhabria. I'm a United
18 States district judge for the Northern District of California.
19 On behalf of the United States District Court, I want to
20 welcome you here.

21 Why don't we start first by having my Courtroom Deputy,
22 Kristen Melen, who is sitting right here, swear everybody in as
23 prospective jurors.

24 **THE CLERK:** All rise.

25 (Prospective Jurors sworn.)

~~JURY VOIR DIRE~~JURY VOIR DIRE

1
2 **THE COURT:** Okay. I realize that you are all
3 summoned here. You're not here necessarily of your own free
4 will, but we are nonetheless very thankful that you are here
5 today.

6 Other than maybe voting, there is no better way for an
7 average citizen to participate in our democracy and to make a
8 contribution to our community. I think a lot of people would
9 actually say that jury service is more important and more
10 meaningful than voting.

11 After all, the founders of our democracy created the
12 judiciary and this jury system almost 230 years ago, and it's
13 still here, and it's one of the things that has helped protect
14 our freedom and one of the things that has allowed our
15 democracy to survive for so long.

16 And I think every jury that I have been involved with has
17 come away feeling -- you know, even if a juror might have been
18 skittish about being selected at the outset, every juror has
19 come away feeling like it really was a positive experience and
20 they really were able to make a meaningful contribution to the
21 community.

22 Now, if you end up serving on the jury in this case, I
23 think it will be probably a better experience than jury service
24 in the vast majority of cases, and that's for a couple of
25 reasons.

1 One, we expect this trial to last around a week. What
2 that means is that we can't give you a precise estimate for how
3 long the trial is going to go, but, you know, you will be out
4 of here before Thanksgiving. I mean, the case will be over
5 before Thanksgiving and quite possibly, you know, significantly
6 before that.

7 But the other thing this case is that it's not a boring
8 case or a case that will be difficult for you to wrap your mind
9 around. It's not a patent case, for example. It's not an
10 unpleasant subject matter, like a child are pornography case,
11 or something like that. This is a First Amendment case. So in
12 terms of the amount of time that it will take and in terms of
13 the subject matter, it's about as good a way for you to
14 complete your jury service as I can imagine.

15 Let me talk about scheduling. The way we work here is
16 that we begin at 8:30 in the morning. And we go until some
17 between 2:00 and 2:30 in the afternoon. We take a short break
18 or two in the morning and we do a -- like, a 45-minute lunch
19 break at around 11:45 or 12:00 o'clock. We never -- we might
20 keep you a little bit longer than 2:00 o'clock, if we need to
21 finish something up. If there is -- you know, if the witness
22 is in the middle of testimony, but we will never keep you here
23 longer than 2:30. You have my assurance of that.

24 The purpose of having that schedule is so that you can
25 sort of take care of whatever business you need to take care of

1 during business hours. We don't keep you here all day. And
2 then in the afternoons, we are working. I'm working and the
3 lawyers are working on evidentiary issues and other issues
4 outside the presence of the jury in order to make things more
5 efficient during the time that you are here.

6 So the schedule is really designed to make things -- I was
7 going to say as convenient as possible for you, but I guess
8 what I will say is to reduce as much as possible the
9 inconvenience for you and to be as efficient as possible and to
10 get as much work done as possible outside your presence so that
11 we're not wasting your time.

12 And by the way, we're not in trial on Thursdays. So we go
13 Monday, Tuesday, Wednesday and Friday.

14 There is only one exception to the rule that you won't be
15 here past 2:30 and that is if during deliberations -- after the
16 jury is selected, if during deliberations you decide you want
17 to stay past 2:30 to continue deliberations, you -- that will
18 be up to you. If you decide that it would be more efficient to
19 do it that way. But other than that, we won't -- we won't keep
20 you here past 2:30 and you can bank on that in terms of making
21 your other plans.

22 With respect to how things are going to go today. Today
23 we will, obviously, go through the process of jury selection.
24 I expect that we will have a jury selected by lunch time and
25 then we will take a lunch break. Small chance we need to take

1 a lunch break before the jury is picked, but very unlikely.
2 And then you will come back here and hear opening statements
3 today and we may even hear from the first witness in the case
4 today. That will probably -- that will probably be it. And
5 then after that, we'll resume again tomorrow morning at 8:30.

6 Once the jury is selected, I and Kristen will give you a
7 little more detail about sort of the ins and outs of being here
8 every day and what is expected of you, but that's sort of the
9 basic schedule that you need to be aware of.

10 Now, keeping all of that in mind, keeping in mind the fact
11 that this is a relatively short trial and whatnot, and keeping
12 in mind the fact that if anybody has any difficulty with
13 serving on this particular jury at this particular time, you
14 will not be released from your jury service. You will be sent
15 back up to the jury office and perhaps be put on a different
16 jury that lasts -- for a case that lasts five weeks instead of
17 five days.

18 Keeping all that in mind, if there is something going on
19 in your life right now that would make it extremely difficult
20 or impossible to serve on this jury at this time, now is the
21 time to share that with me.

22 And I'm not talking about an inconvenience. I'm not
23 talking about the need to rearrange things at work. I'm
24 talking about prepaid travel plans, for which documentation
25 will be requested, or things along those lines.

1 And let me ask if anybody has anything going on in their
2 life right now that would make it extremely difficult or
3 impossible to serve on this jury, could you raise your hand and
4 we'll get a microphone to you and talk to you about it.

5 **THE COURT:** Okay. And before you speak, let me just
6 ask you, whenever anybody speaks and whenever any of the
7 prospective jurors speak, if you could start off by giving us
8 your first and last name so we know who you are, that would be
9 much appreciated.

10 **PROSPECTIVE JUROR TAYLOR:** My name is Yuriy Taylor.

11 **THE COURT:** Okay.

12 **PROSPECTIVE JUROR TAYLOR:** My wife has surgery
13 scheduled for the beginning of next week. After that, the plan
14 is for her to be on disability for a few weeks. Which very
15 much preoccupies my mind in terms of preparation and some other
16 appointments, which I feel could make it difficult for me to
17 stay focused on what I need to be focusing on this week.

18 **THE COURT:** Okay. And --

19 **PROSPECTIVE JUROR TAYLOR:** That is my concern.

20 **THE COURT:** I'm sorry to interrupt.

21 **PROSPECTIVE JUROR TAYLOR:** That is my concern.

22 **THE COURT:** Okay. What day is her surgery scheduled
23 for?

24 **PROSPECTIVE JUROR TAYLOR:** Monday or Tuesday of next
25 week.

1 **THE COURT:** Monday or Tuesday?

2 **PROSPECTIVE JUROR TAYLOR:** Next week.

3 **THE COURT:** All right. Thank you.

4 (Show of hands)

5 **PROSPECTIVE JUROR ALIYEV:** My name is Eldaniz Aliyev.
6 I have 11-years-old twin boys. Today, stay home because nobody
7 can take them to school. My wife has a child care, she's from
8 7:00 to 6:00, stay with other kids. But my kids stay home
9 today. I don't know.

10 And then tomorrow we have a parent-teacher conference,
11 2:30 tomorrow, that is on at this point.

12 **THE COURT:** Okay, and you said that your wife, what
13 does your wife do?

14 **PROSPECTIVE JUROR ALIYEV:** She has a daycare, child
15 care. And then she can't stop child care to take my kids to
16 school because, you know, from 7:00 to 6:00 she's provider,
17 daycare provider.

18 **THE COURT:** And you live here in San Francisco?

19 **PROSPECTIVE JUROR ALIYEV:** Yes, sir.

20 **THE COURT:** And what time do your sons' school start?

21 **PROSPECTIVE JUROR ALIYEV:** Start at 9:00 until 3:30.

22 But this week, 2:30, parent-teacher conference week, this week.
23 That's all.

24 **THE COURT:** So your parent-teacher conference is
25 today?

1 **PROSPECTIVE JUROR ALIYEV:** Tomorrow, 2:00. But today
2 can't take them to school. Eleven years old, can't take --
3 school alone.

4 **THE COURT:** Thank you.

5 **PROSPECTIVE JUROR LIAO:** My name is Patti Liao. I
6 have a flight booked on Saturday, so if it's shorter than that,
7 that's fine.

8 **THE COURT:** This coming Saturday?

9 **PROSPECTIVE JUROR LIAO:** This coming Saturday.

10 **THE COURT:** Where are you headed to?

11 **PROSPECTIVE JUROR LIAO:** I'm going to the D.C. area,
12 Virginia, for Thanksgiving week.

13 **THE COURT:** Okay.

14 **PROSPECTIVE JUROR KUJANPAA:** Yes, Your Honor. My
15 name is David Kujanpaa. I also have a flight booked for
16 Saturday morning to Florida. I have very elderly parents
17 there.

18 My mother was diagnosed with cancer earlier this year.
19 She underwent radiation therapy for lesions in her brain. She
20 is taking targeted therapy for a lung tumor, and seems to be
21 doing okay, except that she has horrible memory issues, and
22 therefore is very reliant on my father as primary care giver.

23 And I have just learned in the last week or two that he
24 has fallen victim to more than one fraudulent scam, to the tune
25 of tens of thousands of dollars. And so I need to get down

1 there to assess the situation, see if they are still
2 financially solvent, or if we need to make arrangements to sell
3 their house.

4 **THE COURT:** Okay. Sorry to hear that. Thank you.

5 **PROSPECTIVE JUROR KUJANPAA:** Thank you.

6 **PROSPECTIVE JUROR SISSON:** Ed Sisson. And I too have
7 a flight, to Chicago -- Sunday, though -- for the week.

8 **THE COURT:** Okay. You have a flight to Chicago on
9 Sunday for the week.

10 **PROSPECTIVE JUROR SISSON:** Yes.

11 **THE COURT:** Okay.

12 **PROSPECTIVE JUROR TEMESGEN:** My name is Muluwork.
13 I'm working at --

14 **THE COURT:** I'm sorry, it's Muluwork Temesgen?

15 **PROSPECTIVE JUROR TEMESGEN:** Yeah.

16 **THE COURT:** Thank you.

17 **PROSPECTIVE JUROR TEMESGEN:** You're welcome. I'm
18 working as a temp employee. The company pay me is not enough
19 to factor in to the jury every day. That is my financial
20 problem.

21 **THE COURT:** What company do you work for?

22 **PROSPECTIVE JUROR TEMESGEN:** I work for, like, San
23 Pablo Casino, cocktail server.

24 **THE COURT:** And what is your work schedule?

25 **PROSPECTIVE JUROR TEMESGEN:** Four, but I have to be

1 there like 3:30. 4:00 to 1:00. 1:00 p.m. 1:00 a.m., sorry.

2 **THE COURT:** And what is your occupation?

3 **PROSPECTIVE JUROR TEMESGEN:** Cocktail server.

4 **THE COURT:** And, the San Pablo casino does not pay
5 its employers for jury --

6 **PROSPECTIVE JUROR TEMESGEN:** No, they pay, but it --
7 not for me, it depend on my income, my tip. They pay me like
8 9.20 but the tax it takes, maybe the maximum I get is 400, 300.
9 That's enough for two weeks but that's about two weeks, but
10 that is not enough for my rent, for everything.

11 **THE COURT:** Okay, than you.

12 **PROSPECTIVE JUROR TEMESGEN:** You are welcome.

13 **PROSPECTIVE JUROR GONZALES:** Hi. My name is Aileen
14 Gonzales. I'm currently pregnant right now, but throughout my
15 pregnancy I have been having complications. I was supposed to
16 see a doctor today, but I had to cancel it because of jury
17 duty.

18 **THE COURT:** Okay, thank you.

19 **PROSPECTIVE JUROR DURHAM:** Good morning. My name is
20 Robert Durham. I have non-refundable plane tickets to Mexico,
21 leaving on Saturday for a week.

22 **THE COURT:** Okay. All right. Thank you.

23 Can I see the attorneys at sidebar for a moment?

24 **LAW CLERK:** One more.

25 **THE COURT:** Oh, I'm sorry.

1 **PROSPECTIVE JUROR ZHANG:** Yeah, I can -- yeah. My
2 name is Tao Tao Zhang. You know, today is my last day as jury
3 duty but tomorrow and next week I have a lot appointment, you
4 know.

5 **THE COURT:** Okay. What are your appointments?

6 **PROSPECTIVE JUROR ZHANG:** Tomorrow, tomorrow.
7 Tomorrow morning, from, I think maybe from 9:00 -- 9:00 a.m. to
8 6:00 p.m. Yeah, I have a lot of patients. Sorry.

9 **THE COURT:** You have a lot of patients, okay. I'm
10 sorry; what do you do? What is your job?

11 **PROSPECTIVE JUROR ZHANG:** I'm dentist. But today is
12 my last day, is jury duty. I have -- I have two weeks, I
13 blocked two weeks, but this --

14 **THE COURT:** So this is the first time you have been
15 called in for jury duty, today?

16 **PROSPECTIVE JUROR ZHANG:** Yes, yes.

17 **THE COURT:** Okay. And you are a dentist?

18 **PROSPECTIVE JUROR ZHANG:** Yeah yes, yeah.

19 **THE COURT:** So you have appointments with patients.

20 **PROSPECTIVE JUROR ZHANG:** Yes, very full, yes,
21 already.

22 **THE COURT:** Okay. Okay. Thank you.

23 (Whereupon, the following proceedings were held at
24 sidebar.)

25 **THE COURT:** So, you know, we are going to have a

1 problem. They didn't send us enough jurors. We have 22
2 people. And, nine of them are going on hardship.

3 I mean, my inclination was to let everyone go except for
4 the dentist. But everybody else, it sounded like a legitimate
5 hardship.

6 So, that would leave us with how many people? Twelve?

7 **MS. NYGAARD:** Ten?

8 **MR. BENEDETTO:** Thirteen --

9 **MS. NYGAARD:** Twenty-two?

10 **MR. LEE:** This is why we're lawyers.

11 **MR. BENEDETTO:** Fourteen.

12 **THE COURT:** So, I mean, we have no flexibility,
13 right, because the plan is to select eight. And we don't have
14 to select eight, we can select fewer than eight. But I'm a
15 little reluctant to select fewer than eight in case it falls
16 off during trial.

17 So I think what I'm going to do is have Kristen call for
18 more jurors. I don't know why they only sent us 22 jurors.
19 But, I think we will proceed with jury selection, and you know,
20 I'll -- we will proceed with -- I'll excuse those eight people.
21 And, we will proceed with the questionnaires.

22 And then hopefully, we will have -- get a collection of,
23 like, five prospective jurors at some point during the morning,
24 figure out a way to start incorporating them into the selection
25 process.

1 Thoughts or objections?

2 **MR. LEE:** No objection from us, Your Honor.

3 **MS. NYGAARD:** No objection.

4 **THE COURT:** Okay, thank you.

5 (Conclusion of sidebar discussion; the following
6 proceedings were held in the presence and hearing of
7 the Jury:)

8 **THE COURT:** Okay, so I'm going to excuse the
9 following people. And as I said, you have to go back to jury
10 office and let them know that you have not been released from
11 jury duty; you have only been released from this trial.

12 Mr. Aliyev, Ms. -- is it Liao?

13 **PROSPECTIVE JUROR LIAO:** Yes.

14 **THE COURT:** Ms. Liao. Mr. Kujanpaa. Mr. Taylor.
15 Mister -- is it Sisson? S-I-S-S-O-N?

16 Ms. Temesgen. Mr. Durham, and Ms. Gonzales. You can head
17 back to the jury office.

18 (Off-the-Record discussion between the Court and
19 Clerk)

20 **THE COURT:** Okay, so Kristen is passing out to the
21 rest of you a questionnaire. And in a moment, I'm going to ask
22 you to take a look at that questionnaire, and verbally answer
23 the questions on the questionnaire. Fairly simple, 20
24 questions.

25 And the point of asking you to answer those questions to

1 us out loud is for you to give us a sense of -- of what you're
2 like, and your background and stuff like that. So, so that the
3 lawyers can begin to assess you as prospective jurors.

4 Now, before I do that, before I have you -- before you
5 start reading that questionnaire and thinking with about your
6 answers to that, I would like to introduce everybody here to
7 make sure -- I think it is unlikely, but just to make sure you
8 don't know anyone involved in the case.

9 So, let me start with the court staff. I mentioned a
10 little bit ago, you have already interacted with her a little
11 bit, this is Kristen Melen, my courtroom deputy. I have
12 several courtroom clerks. Here right now, Rebecca Lee.
13 Elizabeth Yates has been passing around the microphone. She's
14 an intern here in the building.

15 We will have two court reporters working this trial. One
16 is named Debra Pas and the other is Belle Ball.

17 The plaintiff in this case is named Jesse Perez. The
18 attorneys for Mr. Perez are Randall Lee -- or the team for
19 Mr. Perez which includes attorneys and support staff, are
20 Randall Lee, Matthew Benedetto, Tim O'Dwyer and Katie Moran of
21 the WilmerHale law firm.

22 The defendants in this case are Sean Burris, Anthony
23 Gates, Daniel Gongora, Eric Healy, and Guillermo Pimentel.

24 The attorneys for the defendants or the defense team for
25 the Defendant are Jennifer Nygaard, Jocelyn Tucay and Elliott

1 Seals from the California Attorney General's office.

2 Now, if you know or think you might know anybody who I
3 identified, can you please raise your hand?

4 (No response)

5 **THE COURT:** Okay. Thank you.

6 Now let me read you a list of potential witnesses who will
7 be called in this case. It's not certain that every one of
8 those witnesses will take the stand but just in case you think
9 you might know anybody: Judd Anderson, David Barneburg, Suzan
10 Hubbard, Rudy Guerrero, Salvador Mendoza, and Richard Subia.
11 That is in addition to the plaintiff and the defendants who
12 might be called as witnesses in this case.

13 Does anybody think they might know any of those witnesses?

14 (No response)

15 **THE COURT:** Okay. So let me describe the process
16 that we are going to follow the rest of the day. I described
17 it a little bit already.

18 But, the job of the jury is to decide what happened. To
19 decide the facts of the case. You take the law as I give it to
20 you, and you follow the law. And you apply it to the facts of
21 the case as you find them, to decide whether the defendants are
22 liable to the plaintiff.

23 Given the performance of your job as factfinders, we have
24 this process for picking the jury that's designed to make sure
25 that the jury is fair for both sides.

1 The first step of that process will be to have you answer
2 the questions that are in the questionnaire that has been
3 handed out to you and as I said we will have you answer those
4 questions verbally.

5 During that process, I may ask a few followup questions of
6 you, to get any clarifications or to further discuss anything
7 that you feel might need discussing or that I feel might need
8 discussing.

9 And after that, the lawyers will get a chance to ask you
10 some followup questions for a short period of time. And after
11 that, we'll be pretty much ready to pick the jury.

12 And by the way, if there's anything that you need to
13 discuss, that you need to raise that's a private matter, that
14 you don't feel comfortable discussing in this semi-full
15 courtroom, just let me know. We will bookmark the issue and we
16 will bring you back to the jury room to discuss it with you.
17 The court reporter still needs to be there and the lawyers need
18 to be there, but if it's a private matter that you -- where you
19 would rather sort of limit the audience, like I said, just let
20 me know and we'll bookmark the issue.

21 So, why don't we go ahead and start with the
22 questionnaire.

23 And, Ms. Williams, you are Juror No. 1. So you have got
24 the unfortunate task of starting off. Feel free to take your
25 time. If you don't understand any of the questions feel free

1 to ask clarification questions.

2 And then the rest of you, what I would ask is that you pay
3 attention during this process, pay attention to the answers and
4 pay attention to my followup questions, so it will help clarify
5 for you sort of what we're looking for in asking you these
6 questions.

7 One moment.

8 (Off-the-Record discussion between the Court and
9 Clerk)

10 **THE COURT:** Give me just one second.

11 All right. Thanks. Go ahead.

12 **PROSPECTIVE JUROR WILLIAMS:** My name is Dana
13 Williams. I'm 47. I live in Brentwood. I was born in
14 Minnesota.

15 I'm a hospice nurse, registered nurse. And I work for
16 Kaiser. And prior to that I did hospice with Hospice of the
17 East Bay in Pleasant Hill.

18 My spouse is a professor of microbiology at Cal State.

19 I have four children. My oldest is 27. She is a
20 hairstylist. 26 is a contracts administrator at Sycomp. And
21 23 is a -- oh, my gosh, I just blanked. She starts her job
22 this week at Sycomp. Executive administrator, I think is her
23 title. And then my son delivers pizza. He's 20.

24 I have a college degree in nursing. I don't have any
25 difficulty with English. I have never served in the military.

1 I have never served on a jury. And, I don't think there's
2 anything that would prevent me from being fair.

3 **THE COURT:** Okay, thank you very much.

4 **PROSPECTIVE JUROR RIEWE:** My name is Linda Riewe.
5 I'm 55 years old. I live in Oakland. I have been there more
6 than five years. I was born in Milwaukee, Wisconsin.

7 I'm a librarian. And I have been working as a librarian
8 for ten years, and before that sort of in a library, so library
9 assistant for a few years. Three years, maybe, before that.

10 My employer is the Mathematical Sciences Research
11 Institute. I have been at that job for more than five years.

12 No other adults live in my household. I have no children.
13 The highest grade I completed was a master's of library and
14 information science.

15 Before that, I had an undergraduate degree, double major
16 in mathematics and computer science, with a minor in education.

17 I have no difficulty understanding or reading English. I
18 have never served in the military. I have never served on a
19 jury.

20 And, there's nothing that would prevent me from being a
21 fair and impartial juror.

22 **THE COURT:** Thank you.

23 **PROSPECTIVE JUROR ZHANG:** My name is Tao Tao Zhang.
24 And, 34. Uh-huh. I'm living Foster City. And I think, I'm
25 living here over five year. I was born in Beijing, China.

1 Working, I'm dentist, you know. And employees,
2 (Inaudible) dental care. Yeah. I -- okay. I'm working over
3 ten years. My husband has -- my husband -- husband is the
4 engineer. I have no children. Uh-huh. Yeah.

5 I graduated the Beijing, with Beijing University. You
6 know, I'm speak English is not very well, yeah.

7 **THE COURT:** Ms. Zhang, could I ask you a question?

8 **PROSPECTIVE JUROR ZHANG:** A little bit difficult to
9 understand, you know, yeah.

10 **THE COURT:** I was going to ask you. Have you had
11 difficulty understanding --

12 **PROSPECTIVE JUROR ZHANG:** Yes, a little bit
13 difficult. Yeah. But I can read something, yeah. But, I
14 speak is not -- not very -- uh-huh. Yeah.

15 **THE COURT:** Okay, thank you.

16 **PROSPECTIVE JUROR ZHANG:** Yeah. Yeah. Yes. Yeah, I
17 think -- yeah, I understand --

18 **THE COURT:** And Ms. Zhang, have you ever served on a
19 jury before?

20 **PROSPECTIVE JUROR ZHANG:** Sorry? Yeah.

21 **THE COURT:** Have you ever served on a jury before or
22 been on a grand jury?

23 **PROSPECTIVE JUROR ZHANG:** No, first time.

24 **THE COURT:** Thank you.

25 **PROSPECTIVE JUROR BRANSON:** My name is Lynn Branson.

1 I'm 56. I live in Walnut Creek for more than five years. I
2 was born in El Paso, Texas. I'm currently working in the
3 Lafayette School District in an early intervention program,
4 which is for three- to five-year-old special-needs children.
5 This is my third year there.

6 Prior to that, I was working as a Certified Public
7 Accountant.

8 My husband lives in my home. He works for Chevron.

9 We have two children. One is 27. She is a speech
10 therapist. Our son is 19, he goes to Oregon State.

11 I have a bachelor's degree in accounting. No difficulty
12 in understanding English.

13 I have never been in the military. Never served on a
14 jury. And I don't think there's anything that would prevent me
15 from being fair.

16 **THE COURT:** Thank you very much.

17 If we could head back down to Mr. Larson here.

18 **PROSPECTIVE JUROR LARSON:** My name -- my name is Arlo
19 Larson. I'm 73 years old. I live in Oakland, California. And
20 I lived there, oh, about 30-plus years.

21 And I was born in Bemidji, Minnesota.

22 My job is database administrator, and I've worked at that
23 job for a little more than 30 years. My employer is Kaiser
24 Permanente.

25 And my wife is living in the house with me. And, she

1 works as a substitute teacher for the Oakland Public Schools.

2 I have three children. My son, oh, let's see. I think
3 he's -- he's 32 years old, and he's an immigration lawyer.
4 Then I have a daughter who has been -- she is 26 years old, and
5 she has worked in miscellaneous jobs. Video, and has been a
6 barrista and miscellaneous things. And then I have another son
7 who is autistic, so he does nothing.

8 My educational background, I have a doctorate in
9 philosophy. I also have a bachelor of science in computer
10 science.

11 I don't have any difficulty in understanding English. And
12 I never served in the military.

13 Also, I never served in a jury before. And I don't know
14 of anything that would prevent me from being a fair and
15 impartial juror.

16 **THE COURT:** Mr. Larson, following up on what you said
17 about your son, you said your son is an immigration attorney?

18 **PROSPECTIVE JUROR LARSON:** Yes.

19 **THE COURT:** Obviously we haven't talked really about
20 what this case involves yet. There's no immigration issue.

21 But, but, is there anything about your interactions with
22 your son that you think would affect your ability to follow the
23 law as given to you by a judge and decide the facts fairly?

24 **PROSPECTIVE JUROR LARSON:** No, I don't think so.

25 **THE COURT:** Okay, great. Thank you.

1 Is it Mr. Patrick?

2 **PROSPECTIVE JUROR PATRICK:** It is. My name is John
3 Patrick. I'm 39 years old. I live in San Francisco. I have
4 lived here since 2006, although between 2012 and 2013 I lived
5 in Miami Beach. I was born in Trent, Wyoming.

6 I'm an attorney. I have been an attorney since 2001. I'm
7 a partner at the firm of Gordon & Rees. I've been there since
8 the beginning of this year.

9 Before that I was a partner with the firm of Wilson Elser.
10 For two years before that, I was a partner with a firm called
11 Watt Tieder, which is T-I-E-D-E-R, also in San Francisco, for
12 seven years.

13 The only other adult in my household is my wife Amy.

14 **THE COURT:** Mr. Patrick, can I interrupt just for a
15 sec to ask a couple of followup questions?

16 **PROSPECTIVE JUROR PATRICK:** I'm not shocked,
17 Your Honor.

18 **THE COURT:** So, you're at Gordon & Rees now. Are you
19 a litigator or a corporate attorney?

20 **PROSPECTIVE JUROR PATRICK:** I'm a litigator. I'm a
21 construction lawyer.

22 **THE COURT:** Is that what you did at the other couple
23 of firms as well?

24 **PROSPECTIVE JUROR PATRICK:** That's what I have done
25 more or less exclusively since, let's say, 2004.

1 **THE COURT:** Okay. Where did you go to law school?

2 **PROSPECTIVE JUROR PATRICK:** University of Minnesota.

3 **THE COURT:** Okay. Thank you.

4 **PROSPECTIVE JUROR PATRICK:** Okay. The only other
5 adult in my household is in my wife Amy. She works for Charles
6 Schwab as a manager in their treasury department, running their
7 bank's stress testings.

8 We do not have any children.

9 I have a J.D. I do not have any particular difficulty
10 understanding or reading English.

11 I have not served in the military, although my brother and
12 his wife both did.

13 I have never served on a jury before, although I have been
14 interviewed before. There's nothing about the case as
15 Your Honor has described that suggest to me I could not be a
16 fair and impartial juror.

17 **THE COURT:** Okay. We will -- you know, we'll get
18 into a little more what the case is about, and we will -- we
19 will -- everybody will have a chance to talk a little bit more
20 about that. But for now, at least, I just wanted to get a
21 general sense of everybody. So, thank you.

22 **PROSPECTIVE JUROR MILLER:** My name is Dean Miller.
23 I'm 53. I live in Alamo. I have lived there over five years.
24 Born in Bremerton, Washington.

25 I have been self-employed for 30-plus years. The

1 Restoration Cleanup Company is the company I own and operate.

2 **THE COURT:** What is restoration cleanup? What do you
3 all do?

4 **PROSPECTIVE JUROR MILLER:** Insurance, mold, water,
5 fire, damage restoration.

6 I do have children. I have four. I have a 35-year-old
7 daughter, a 21-year-old son, 18-year-old daughter, and
8 12-year-old daughter. My older daughter is the only one that's
9 -- well, no, my daughter's employed, she is a doula, midwife
10 type. My son is just -- he's now into some accounting.

11 Education, just completed high school.

12 I don't have any trouble understanding English. Never
13 served in the military. I have been on a jury.

14 **THE COURT:** Now, because you are the first person
15 that's been on a jury, the questionnaire says it, but I'll just
16 say it again, just to emphasize. We don't want to hear how the
17 jury came out. Right?

18 We only want to hear what type of case it was, and where
19 it was, and whether the jury reached a verdict. But you
20 shouldn't share with us what that verdict was.

21 **PROSPECTIVE JUROR MILLER:** Okay, thank you. It was a
22 county case. It was approximately ten years ago. I believe
23 it's criminal, and we did reach a verdict.

24 And there isn't anything to prevent me from being fair or
25 imposition.

1 **THE COURT:** Okay. Thank you, Mr. Miller.

2 Mister -- is it McGoveran?

3 **PROSPECTIVE JUROR MCGOVERAN:** Yes. Richard
4 McGoveran. I'm 47. I live in Antioch. I have lived there for
5 more than five years. I was born in Walnut Creek.

6 I've worked in my field for 26 years. I work for Shell
7 Oil. I'm an oil refinery operator. I have held my current
8 position for more than five years.

9 I don't have any other adults living with me. I have no
10 children.

11 High-school diploma. I understand and read English.
12 Never served in the military.

13 I have served on a jury. It was a civil case, in about
14 1990. I'm not sure if they reached a verdict or not. I was an
15 alternate. So I did not go to deliberation.

16 **THE COURT:** That's sort of a good time for me to note
17 that we won't have any alternates on this jury. The goal is to
18 select eight jurors, all of whom would deliberate, and
19 participate in reaching a verdict.

20 **PROSPECTIVE JUROR MCGOVERAN:** Okay. And no, there's
21 nothing that would prevent me from being fair.

22 **THE COURT:** Thank you.

23 **PROSPECTIVE JUROR JONES:** My name is Ginette Jones.
24 I'm 66. I live in Emerald Hills. We have been living there
25 for 30-plus years.

1 I was born in Egypt. I'm a business administrator and
2 surgical coordinator. And I work for Dr. Jane Weston in
3 Atherton, plastic surgery center. I have had my job for
4 ten-plus years.

5 My husband lives with me, and he is retired. We have two
6 children. Thirty-nine, he's a Realtor. And -- sorry, 40, he's
7 a Realtor. Thirty-nine, he's an electrician.

8 I have an AA degree, associate of arts in business. I
9 don't have a difficulty understanding or reading English.

10 I never served in the military, never served on a jury.
11 And I don't believe I have anything that would prevent me from
12 being a fair and impartial juror.

13 **THE COURT:** Thank you.

14 **PROSPECTIVE JUROR ZAIDI:** My name is Asma Zaidi. And
15 I'm 45 years old. I live in Fremont, California. And I have
16 been living in this place more than five years.

17 And I was born in Pakistan. And my current job is I'm the
18 owner of two gas stations.

19 And, my husband lives with me. He's an engineer. I have
20 two girls. The older one is 20 years old; she's a full-time
21 student in the university. And the younger one is 13 years
22 old, she is a hard-of-hearing kid. And I'm the only one to
23 take care of her at home, because there's nobody at home to
24 send back to school and everything. And there's nobody at home
25 when I'm not there because my husband is at work, and my

1 daughter is a full-time student.

2 And I don't have any difficulty of understanding English.

3 And I didn't -- never served in the military before, never
4 served in a jury before. And there's nothing that would
5 prevent me from being a fair and impartial juror.

6 **THE COURT:** And your daughter, she's in middle
7 school, I guess?

8 **PROSPECTIVE JUROR ZAIDI:** She is in middle school,
9 yeah. She is in a special school. She's a hard-of-hearing
10 kid.

11 **THE COURT:** And where is the school? In Fremont?

12 **PROSPECTIVE JUROR ZAIDI:** No, in Hayward. I live in
13 Fremont. There is no program in Fremont, so she goes to
14 Hayward school. But when she comes back from school, there is
15 nobody at home, so that's --

16 **THE COURT:** When does her school day end?

17 **PROSPECTIVE JUROR ZAIDI:** Her school, at 3:00.

18 **THE COURT:** Okay, thank you.

19 **PROSPECTIVE JUROR ZAIDI:** Yeah.

20 **PROSPECTIVE JUROR HUANG:** Hi. My name is Lina Huang.
21 I'm 45 years old. I'm living in El Cerrito for more than five
22 years. I was born in Taipei, Taiwan.

23 And my -- my job, I'm an administrative director for
24 preschool. I started my new job on August 10th year. I work
25 for Deport Montessori School (Phonetic). Before that I was an

1 operations manager for a charter school in Oakland.

2 And there's no other adults that live in my household. I
3 don't have any children.

4 I have a bachelor's degree in Chinese and preveterinary
5 medicine. I don't have difficulty understanding or reading
6 English.

7 Never served in military. I served on jury twice. And,
8 one was in federal court, one was in county court. The county
9 court case took about a week. And the federal court case took
10 a month. Both were criminal trials. And both reached
11 verdicts.

12 There isn't anything preventing me from being fair and
13 impartial.

14 **THE COURT:** In fact, you seem very well qualified,
15 having spent five weeks of your life already on a jury.

16 **PROSPECTIVE JUROR GALBRETH:** My name is Ed Galbreth.
17 I'm 68. I live in Point Richmond. I lived there about five
18 years. I lived in Oakland before that. I was born in
19 Kingston, New York. I'm retired. Before that, I was a
20 property manager in Ithaca, New York.

21 There is one other adult in my household, and she works
22 for the -- she is a secretary for the West Contra County School
23 District.

24 I have two sons. One is 43, he is a lawyer. The other is
25 28, and he works in a facility for disabled adults.

1 I have a BA in sociology. I have no problem understanding
2 or reading English.

3 I haven't served in the military. I have never been on a
4 jury. And, there's nothing that would prevent me from being a
5 fair and impartial juror.

6 **THE COURT:** Thank you.

7 **PROSPECTIVE JUROR SOTO:** I'm Kim Soto. I'm 48. I
8 was born and raised in Livermore. I work at Safeway for the
9 last 15 years, and I just got promoted up to a checker plus
10 night crew. Working on nights, so I'm stocking shelves.

11 My other half, he works -- just started at a Ford
12 dealership as car porter.

13 I have a 24-year-old working at this place called Top Con,
14 it's a computer place. My daughter's just turning 19 this
15 Sunday. She's working at this fast food place where -- as a
16 cook.

17 I have a diploma for a car dealer, for working on cars,
18 and mechanic. I can read and understand English. And I have
19 no military background. I haven't served on any juries.

20 There's nothing else going that I can -- I can do this.
21 So --

22 **THE COURT:** Thank you.

23 **PROSPECTIVE JUROR NORTH:** My name is Jim North. I'm
24 57 years old. I live in Dublin, California. I've lived there
25 for 30 years. Was born in Salt Lake City.

1 Right now I'm a software engineer at Verizon. For four
2 years before that I was one year at eBay/PayPal. Before that,
3 I was nine and a half years at Charles Schwab, same job,
4 software engineer.

5 There's one adult in my home. It's my wife, Toni. She is
6 an HR manager for Albertson's, Safeway, whatever they're
7 calling themselves these days.

8 We have one son, 24, gainfully employed at Cisco as a
9 cloud engineer.

10 My highest grade of education, I have an undergraduate
11 degree from Cal State Hayward. I do not have any difficulty
12 understanding or reading English. Have never served in the
13 military.

14 I have served on a jury twice before. Once, one criminal,
15 one civil. We came to a verdict in both cases.

16 I don't believe there's anything that would prevent me
17 from being an impartial juror.

18 **THE COURT:** Thank you very much.

19 So now I want to tell everybody a little bit about this
20 case. And, I want you to think about -- and I'll give anybody
21 a chance to raise their hand who wants to. I want you to think
22 about whether there's anything about the description of the
23 case that raises concerns for you about whether you could be
24 fair and impartial. Okay?

25 This is a civil-rights action brought by the plaintiff,

1 Jesse Perez, who is a prisoner at Pelican Bay State Prison.
2 Mr. Perez is suing the defendants who are correctional officers
3 at Pelican Bay.

4 In 2003 while at a different prison, Mr. Perez was
5 determined by the Department of Corrections to be an associate
6 of the Mexican Mafia prison gang. And as a result he was
7 transferred to Pelican Bay's security housing unit.

8 In 2005, Mr. Perez filed a lawsuit against the officers
9 from the other prison, alleging that the determination that he
10 was a gang associate and the assignment to the security housing
11 unit violated his constitutional rights.

12 On October 10, 2012, four of the defendants in this case
13 searched Mr. Perez's cell, based on instructions from their
14 supervisor to conduct a new review of Mr. Perez's gang status.

15 Perez alleges that these four defendants trashed his cell
16 during the cell search and confiscated some of his property.
17 He alleges that a fifth defendant improperly kept some of his
18 property.

19 And he alleges that one of the defendants wrote up a false
20 report against him, called a "Serious Rules Violation Report"
21 with the goal of keeping him in the security housing unit.

22 Perez alleges that the Defendants did these defendants to
23 him out of retaliation for his prior lawsuit, which if true,
24 would be a violation of his First-Amendment rights.

25 The defendants deny that they improperly trashed

1 Mr. Perez's cell or that they improperly kept some of his
2 property or that they wrote up a false report about him. They
3 contend their conduct complied with prison regulations and that
4 they did not retaliate against Mr. Perez based on his prior
5 lawsuit.

6 So that's -- obviously, if you serve on this jury, you
7 learn a lot more about the case, but that is a basic
8 description of it.

9 And so, my question to you, sort of a raise-your-hand
10 question is: Is there anything about the fact that this case
11 involves a prisoner or prison guards that raises concerns for
12 you about whether you could decide the facts fairly and be a
13 fair and impartial juror?

14 (Show of hands)

15 **PROSPECTIVE JUROR PATRICK:** So, nothing that -- I'm
16 not sure that this works but --

17 **THE COURT:** Just for the record, I know you have all
18 introduced yourselves, already but just for recordkeeping
19 purposes, if you could start off still by giving your full
20 name.

21 **PROSPECTIVE JUROR PATRICK:** My apologies, Your Honor.
22 John Patrick.

23 There isn't anything about your description that raised a
24 concern for me. But just in the interest of fairness and full
25 disclosure, there is something that you said that brings

1 another job of mine into question.

2 When I was in law school, I was for two years a clerk at
3 the U.S. Attorney's office for the District of Minnesota. And
4 in connection with that job, I assisted the USAO on a number of
5 1982 actions, whose allegations at times were similar to the
6 ones that you described.

7 That was then in those cases, this is now in this case,
8 but because this is a little bit different than just your
9 standard case I thought that other experience of mine was
10 probably relevant and I should mention it.

11 **THE COURT:** Okay. And it sounds like from your
12 description of it, that you believe that you have the
13 capability of separating any prior work that you have done from
14 this case, and you sort of understand that if you are selected
15 as a juror in this case, your job is to review the evidence,
16 consider only the evidence that appears inside the four walls
17 of this courtroom, and make your decision based on that.

18 Is that right?

19 **PROSPECTIVE JUROR PATRICK:** Certainly, your Honor. I
20 don't know that I even remember that much about the facts of
21 those 1982 cases, but it's probably relevant to mention that I
22 assisted the government in defending some of them.

23 **THE COURT:** Much appreciated. Okay, thank you.
24 Anybody else?

25 (A hand is raised)

1 **THE COURT:** Was it Ms. Soto?

2 **PROSPECTIVE JUROR SOTO:** Yes. I'm Kim Soto.

3 What you are just saying, I just talking to my monthly,
4 she's Hispanic, she was born and raised in Mexico -- well,
5 sorry, born in Mexico and emigrated up here.

6 But similar to what you are talking about, I think that
7 she made a comment something similar to about it. Just jarred
8 my memory that something, something similar, the name doesn't
9 ring a bell, but something kind of came across that it's
10 because of family issues, that's kind of my concern.

11 I mean, I can try and keep everything that's here, but
12 because of family, just -- I'm trying to separate two because
13 that's what you just said, a kind of -- kind of concerning. I
14 have heard about it before.

15 **THE COURT:** So let me ask you a clarification
16 question about that.

17 Are you suspecting that you may have heard something about
18 this particular case? Or are you suspecting that you may have
19 heard something about prisoners generally, or Pelican Bay
20 generally?

21 **PROSPECTIVE JUROR SOTO:** Well, I haven't doubt --
22 heard anything about Pelican Bay, but my mother-in-law's
23 brother been in and out of jail, so I have got an understanding
24 about that. So it's like it's kind of -- there are certain
25 rules that they have and they don't have.

1 And for this case, I haven't really heard anything on this
2 case, but it's just prior to this case, what I have heard about
3 through family.

4 **THE COURT:** Okay. But again, so, are you -- are you
5 -- I want to get a sense. Are you concerned that you may have
6 heard something about this particular case?

7 **PROSPECTIVE JUROR SOTO:** Yeah. A little bit. Not
8 that much but just a little bit. But not that much.

9 **THE COURT:** Okay. And, you said that you don't
10 necessarily recognize any of the names, but you are saying that
11 the issue kind of seems familiar to you, based on prior
12 conversations with family members?

13 **PROSPECTIVE JUROR SOTO:** Yes.

14 **THE COURT:** Okay. All right. Thank you.

15 Anyone else?

16 (No response)

17 **THE COURT:** Okay. Great. So, here's what we are
18 going to do now. We'll take a -- we will take a short break.
19 I think we will take a 20-minute break. So, we will ask
20 everyone to be back here at ten after 10:00, to resume, to
21 resume the jury selection process.

22 And I'll ask the lawyers to take a five-minute break and
23 then come back and we will chat. Okay? Thank you.

24 (Recess taken from 9:47 a.m. to 10:05 a.m.)

25 (Discussion held outside the presence of the Jury)

1 Venire:)

2 **THE COURT:** Kristen is dealing with somebody, so why
3 don't we start without her. Hopefully she will come in.

4 So, I think we have to excuse Ms. Zhang. Juror No. 5, the
5 dentist. Because of language difficulty.

6 Does anybody disagree?

7 **MR. LEE:** No, Your Honor.

8 **MR. SEALS:** That's okay with the defendants.

9 **THE COURT:** Okay. So, you know, there's also this
10 issue about Ms. Soto. And, my tentative inclination was to
11 leave her on for now, and let you guys ask her more questions.
12 I mean, for me it was hard to get a handle on what she was
13 saying.

14 I sort of doubt that she has any knowledge about this
15 actual case, and she may just have had discussions, you know,
16 like about incarceration or something with her relatives. Hard
17 to know.

18 I think it's probably a close question -- I mean, I might
19 already be inclined to excuse her for cause, but my inclination
20 would -- is that it's a close case, and sort of to leave her on
21 for now and let you all explore it with her a little more.

22 So, with that, that would leave us with 13 prospective
23 jurors. And, possibly 12. Depending on how the rest of the
24 discussion goes with Ms. Soto.

25 So I'm told by Kristen that we have, I think, three extra

1 prospective jurors who came out of another -- I guess they
2 weren't needed for another jury selection that was going on
3 this morning. I mean, we could just sort of proceed with the
4 group that we have, and that might leave us with a jury of
5 seven or six people.

6 I would be very reluctant to go with a jury of six people.
7 So I guess, even as I talk about it, my inclination in an
8 abundance of caution is to bring those other three jurors down,
9 even though it's inefficient, and go through an abbreviated
10 version of the drill that we just went through with those three
11 jurors. And then open it up to you all for voir dire of
12 everyone.

13 And those three jurors that we bring in would be
14 juror numbers -- so everybody still has the same number that
15 they had already. They would be seated as Prospective Juror
16 Nos. 23, 24 and 25.

17 And so, if you ultimately, you know, use your challenges,
18 that would bump -- if you use all your challenges and it is not
19 of those three, that would bump a couple of those onto the
20 jury.

21 But I think that's probably the way to go, given where
22 we're at. Does that sound right?

23 **MR. LEE:** I think that sounds right, Your Honor.

24 **MR. SEALS:** Yes, Your Honor. Can I make one comment
25 regarding Ms. Soto?

1 **THE COURT:** Sure.

2 **MR. SEALS:** My only concern would be -- it wasn't
3 really clear what the issue was with her. And, if it is
4 related to the Mexican Mafia.

5 **THE COURT:** Uh-huh.

6 **MR. SEALS:** My only concern, you know, is
7 contamination either way. You know, she mentioned that her
8 mother was Hispanic, and that she has a brother -- I think it
9 was the brother of her mother had been in and out of prison.
10 So I don't know if it would be a Mexican Mafia, related that
11 way, or correctional officer related. But I'm a little
12 concerned about contamination.

13 **THE COURT:** Yeah. I mean, the other thing we could
14 do is we could bring the other -- you said there are three more
15 prospective jurors?

16 **THE CLERK:** Uh-huh.

17 **THE COURT:** And Kristen, were they -- how did they
18 become available? Were they never sent down to the courtroom
19 that --

20 **THE CLERK:** Right.

21 **THE COURT:** -- the jury office was planning to bring
22 them to?

23 **THE CLERK:** They were supposed to come to us to make
24 it an even 25. And for whatever reason, those three didn't
25 make it onto the list. So, never made it to Judge Orrick. And

1 they were supposed to come here. So they have been untouched.

2 **THE COURT:** Okay.

3 **MR. LEE:** Your Honor, with respect to Ms. Soto, could
4 perhaps the Court do further inquiry? And then it doesn't lead
5 into either bar's opportunity.

6 **THE COURT:** What I was going to suggest is what if we
7 bring the three new prospective jurors down, go through the
8 drill with them. And assuming there's no hardship or no cause
9 problem that's apparent with those three, I could just let Ms.
10 -- I could just cut Ms. Soto loose for cause, based on what she
11 said so far.

12 Or would you rather spend time with her and further
13 explore it?

14 **MR. LEE:** Our preference would be to further explore
15 it a bit. I think it is highly unlikely that she has read
16 anything about this specific case. The only press that we are
17 aware of in this case has been in a publication specific to,
18 sort of, prisoners.

19 **THE COURT:** Right.

20 **MR. LEE:** So it may just be that she's, you know,
21 heard something generally about the issues.

22 **THE COURT:** Or about the Mexican Mafia.

23 **MR. LEE:** Yeah, yeah. Clearly, it could cut either
24 way, but I think it's -- yeah.

25 **THE COURT:** Uh-huh. Do you want to talk to her in --

1 do you want to talk to her in here more?

2 **MR. LEE:** Sure, I mean --

3 **THE COURT:** Why don't you start exploring it with
4 her, and if things -- if it seems like there's like a potential
5 contamination problem, I'll cut it off, and we'll resume her
6 voir dire in here. Okay?

7 **MR. SEALS:** (Nods head)

8 **MS. NYGAARD:** (Nods head)

9 **THE COURT:** But other than that, I'll let you guys
10 ask her questions out there.

11 So why don't we get those three other jurors down here.
12 We'll seat them as Nos. 23, 24 and 25.

13 **THE CLERK:** Uh-huh.

14 **THE COURT:** And I'll go through an abbreviated drill
15 with them.

16 **THE CLERK:** Okay. I'll need to just swear them in
17 again.

18 **THE COURT:** Okay. And we'll do that first thing.

19 **THE CLERK:** Okay.

20 **THE COURT:** Okay.

21 **THE CLERK:** And are they getting 20 or 30 minutes
22 apiece for voir dire?

23 **THE COURT:** Thirty minutes apiece.

24 **THE CLERK:** Okay, thank you.

25 **THE COURT:** So, see you in a few minutes.

1 **MR. LEE:** Okay.

2 **THE COURT:** All right, thank you.

3 **MR. LEE:** All right.

4 (Conclusion of discussion; the following proceedings
5 were held in the presence and hearing of the Jury
6 Venire:)

7 **THE CLERK:** Remain seated, come to order. Court is
8 back in session.

9 **THE COURT:** Okay. We're back and we have three new
10 prospective jurors in the courtroom. And this is a little
11 bit -- it's a little bit odd. There was a glitch in the jury
12 office. I'm not sure exactly what happened, but we were
13 supposed to have been sent 25 prospective jurors and only got
14 sent 22 prospective jurors and you three somehow got left up
15 there. I'm not exactly sure what happened, but I really
16 apologize for your having to sit around up there for a little
17 bit. We're going to try to spend a few minutes catching you up
18 right now, if you don't mind.

19 First, my Courtroom Deputy Kristen Melen has to swear the
20 three of you in as prospective jurors. The rest of the group
21 has already been sworn in. So if the three of you could please
22 rise and raise your right hand?

23 (Prospective jurors sworn.)

24 **THE COURT:** So for the three of you, I'm going to try
25 to sort of describe the situation in a somewhat abbreviated way

1 to get you caught up to where we are in the jury selection
2 process.

3 First of all, I'm going to talk about the trial that you
4 have been called down to potentially serve on and the schedule
5 for that trial. It is expected that this trial will last about
6 a week. We cannot predict exactly how long the trial will
7 last, but we can predict with confidence that it will be over
8 before Thanksgiving and perhaps quite a bit before
9 Thanksgiving.

10 Schedule-wise, if you're selected for this jury, we begin
11 every day at 8:30 in the morning and we have you out of here
12 between 2:00 and 2:30 in the afternoon. We never -- we might
13 go a little bit past 2:00, but we'll never go past 2:30. So if
14 you get picked for this jury, you can be assured that you will
15 be out of here by 2:30 and you can sort of take care of
16 whatever business you have.

17 By the way, I should say, you saw my name on the door, but
18 my name is Vince Chhabria and I'm a district judge for the
19 United States District Court of California.

20 The other thing about the schedule is that we don't go on
21 Thursdays. We're what we call dark on Thursday. This trial
22 will proceed today, tomorrow, Wednesday. You don't come in
23 Thursday. We'll proceed again on Friday and, if necessary,
24 resume again Monday the following week.

25 The purpose of this schedule is for us to spend time in

1 the afternoon, the judge and the lawyers, working on
2 evidentiary issues and jury instructions and other matters that
3 are done outside your presence so that we're not wasting your
4 time during the course of trial. So we try to be as efficient
5 as possible and it gives you time, like I said, to sort of
6 organize your affairs in the afternoon if you get selected for
7 this case.

8 Having heard about the schedule, I want to ask the three
9 of you -- I've already gone through this with everybody else,
10 but I want to ask the three of you: Is there anything going on
11 in your lives that would make it extremely difficult or
12 impossible to serve on this jury that we're contemplating here
13 today?

14 Let me just say at the outset, if there is anything that
15 would prevent you -- going on in your lives right now that
16 would prevent you from serving on this jury, I would have to
17 send you back up to the jury office and -- without releasing
18 you from your jury duty, to see if they could find another
19 trial for you at a different time.

20 As I mentioned, this is a relatively short trial. So
21 there would -- there is some benefit to serving on this jury as
22 opposed to a different one.

23 So in light of all that, is there anything going on in
24 your lives right now that would make it extremely difficult or
25 impossible to serve on this jury?

1 **PROSPECTIVE JUROR McMILLAN:** I'm out of work right
2 now and sitting in here is not getting me a job.

3 **THE COURT:** Okay. Hold on a second. Let me get you
4 the microphone and ask you to begin by stating your name.

5 **PROSPECTIVE JUROR McMILLAN:** My name is Dan McMillan.

6 **THE COURT:** Dan McMillan?

7 **PROSPECTIVE JUROR McMILLAN:** Yeah.

8 **THE COURT:** Okay.

9 **PROSPECTIVE JUROR McMILLAN:** Forty. Live in
10 Petaluma --

11 **THE COURT:** You don't need to go through that
12 questionnaire right now.

13 If you could just tell me what it is that's going on in
14 your life that would make it difficult or impossible to serve.

15 **PROSPECTIVE JUROR McMILLAN:** Well, I'm out of work
16 right now, so I can't get a job if I'm sitting in here.

17 **THE COURT:** Okay. And I assume you're actively
18 looking for work?

19 **PROSPECTIVE JUROR McMILLAN:** Yeah.

20 **THE COURT:** Okay. And you live in Petaluma, you
21 said?

22 **PROSPECTIVE JUROR McMILLAN:** Yes.

23 **THE COURT:** Okay, thank you.

24 Anybody else?

25 (No response.)

1 **THE COURT:** Okay. Thanks.

2 So now what I'm -- what I'd like to do is just begin.
3 We've done this with the rest of the folks already. Kristen
4 has given you a questionnaire and I would like for you to just
5 go through that questionnaire and verbally answer the
6 questions. And the purpose of that is for the lawyers and me
7 to get a little bit of a sense of you so that we can know more
8 about everybody as we proceed down the road of picking a jury
9 for this case.

10 So if we could start maybe with Mr. Fernandez.

11 **PROSPECTIVE JUROR FERNANDEZ:** Hi. My name is Arturo
12 Fernandez. I'm 25 years old. I live in Knightsen, California.
13 I was born in Martinez. I work at O'Reilly Auto Parts. I'm a
14 parts specialist there. And I've only worked there for two
15 years so far. And I'm currently living with my parents. And I
16 have no -- no children. And I have a high school diploma and
17 some college. I have not served in the military and it's my
18 first time serving as a juror. And --

19 **THE COURT:** And that last question I'll just tell you
20 a little bit more about it.

21 The role of the juror is to decide what happened in the
22 case, right? Witnesses come and testify. Documents are
23 admitted into evidence. And the role of the juror is to decide
24 what happened in the case, to find the facts. And I give you
25 the law and you're obligated to apply the law as it exists to

1 the facts as you find them.

2 So the question is -- and I will tell you a little bit
3 more about this particular case in a second, but the question
4 is: In general, do you believe that there is any reason that
5 you could not be a fair and impartial juror in a case?

6 **PROSPECTIVE JUROR FERNANDEZ:** No, I don't think so.

7 **THE COURT:** Okay. Thank you.

8 All right. Mr. McMillan, we've heard a little bit from
9 you, but if you wouldn't mind going through the questionnaire.

10 **PROSPECTIVE JUROR McMILLAN:** All right. My name is
11 Dan McMillan. I'm 40. I live in Petaluma. Born in Petaluma.
12 I'm an out-of-work plumber. I live alone. I went through an
13 apprenticeship program. Fine with English. Never been in the
14 military. Never been on a jury. And I'd have to know what the
15 case was to say if I could be impartial or not, so...

16 **THE COURT:** Okay. And we'll get to that in just a
17 second. Maybe you could pass the mic to Ms. Smith?

18 **PROSPECTIVE JUROR SMITH:** My name is Nancy Smith.
19 I'm 71. I live in San Francisco for more than five years. I
20 was born in Missouri. I'm a retired attorney. I was an
21 associate and then a partner with a large downtown law firm. I
22 live alone. I have no children. I have a law degree. I
23 understand English. Never served in the military. I've served
24 on two criminal juries in state court, one about 20 years ago.
25 We did reach verdict. One several years ago --

1 **THE COURT:** And let me just interrupt. Just in case,
2 we don't want to hear what the verdict was.

3 **PROSPECTIVE JUROR SMITH:** I understand.

4 **THE COURT:** We want to know whether you reached a
5 verdict.

6 **PROSPECTIVE JUROR SMITH:** That's what the
7 instructions say.

8 And a couple years ago I was in another state criminal
9 court jury and we did reach a verdict. I assume I would be
10 fair and impartial, but I would have to know what the case is
11 about.

12 **THE COURT:** So let me go ahead and read you a
13 description of the case. I apologize that you have to hear it
14 one more time.

15 This is a civil rights action brought by the plaintiff,
16 Jesse Perez, a prisoner at Pelican Bay State Prison. Mr. Perez
17 is suing the defendants, who are correctional officers at
18 Pelican Bay.

19 In 2003, while at a different prison, Mr. Perez was
20 determined by the Department of Corrections to be an associate
21 of the Mexican Mafia prison gang and as a result, he was
22 transferred to Pelican Bay's Security Housing Unit.

23 In 2005 Mr. Perez filed a lawsuit against the officers
24 from that other prison alleging that the determination that he
25 was a gang associate and the assignment to the Security Housing

1 Unit at Pelican Bay violated his constitutional rights.

2 On October 10th, 2012 four of the defendants searched Mr.
3 Perez's cell based on instructions from their supervisor to
4 conduct a new review of Mr. Perez's gang status. Mr. Perez
5 alleges that these four defendants trashed his cell during the
6 cell search and confiscated his property. He alleges that a
7 fifth defendant improperly kept some of his property. And he
8 alleges that one of the defendants wrote up a false report
9 against him called a Serious Rules Violation Report with the
10 goal of keeping him in the Security Housing Unit.

11 Mr. Perez alleges that the defendants did these things to
12 him out of retaliation for his prior lawsuit, which, if true,
13 would be a violation of his First Amendment rights.

14 The defendants deny that they improperly trashed Mr.
15 Perez's cell, or that they improperly kept some of his
16 property, or that they wrote up a false report on him. They
17 contend that their conduct complied with prison regulations and
18 that they did not retaliate against Mr. Perez based on his
19 prior lawsuit.

20 So the question really is -- this is a First Amendment
21 case and it's a case involving a prisoner and prison guards.
22 And so the question is: Is there anything about that, is there
23 anything about the description that I read to you or the fact
24 that this case involves a prisoner or prison guards that you
25 think would prevent you from being a fair and impartial juror

1 in this case? Raise your hand if you -- if you think there may
2 be a problem.

3 All right. Mr. McMillan?

4 **PROSPECTIVE JUROR McMILLAN:** Yeah. I just got laid
5 off from San Quentin and so, you know, dealing with the COs and
6 stuff, I don't know if that's something -- I was working
7 hand-in-hand with the inmates and then having COs supervise,
8 and I don't know if it's really appropriate for me to be
9 sitting in on something like this.

10 **THE COURT:** You were working as a plumber at San
11 Quentin?

12 **PROSPECTIVE JUROR McMILLAN:** Yeah.

13 **THE COURT:** Okay. So there is no question that you
14 know a lot more about how things work in San Quentin than the
15 rest of us and probably about how things work in prisons
16 generally. The question is whether you would be unfairly
17 biased in favor of one side or another.

18 Do you think that you would be unfairly biased in favor of
19 one side or another or do you think you could sort of limit
20 your inquiry to examining the evidence that comes in in this
21 case and making a decision based -- about what happened based
22 on the evidence that you hear in this case?

23 **PROSPECTIVE JUROR McMILLAN:** Having been in there and
24 seen it and, like -- there was definitely guards that were
25 focused on certain inmates, and it was kind of -- it was

1 definitely a bias thing, where they could go: Oh, well, he --
2 you know...

3 **THE COURT:** And, obviously, any issue that you may
4 have had with -- or anything you may have observed with respect
5 to any guard or any prisoner -- and those people are not
6 involved in this case presumably. I will say -- rattle off
7 everybody's names to make sure you don't know anybody, but
8 would you be able to separate, do you think, you know, any
9 knowledge that you gained or any experience that you had about
10 other people and assess the evidence with respect to these
11 people based on what you hear in the courtroom?

12 **PROSPECTIVE JUROR McMILLAN:** I -- I don't think so.
13 I don't, just from what I saw in there.

14 **THE COURT:** Okay.

15 **PROSPECTIVE JUROR McMILLAN:** I would be a little -- a
16 little leery.

17 **THE COURT:** Okay. Okay. Thanks very much.

18 Why don't I chat briefly at sidebar with the attorneys?

19 (Proceedings held at sidebar.)

20 **THE COURT:** I would be -- I'm sort of inclined to
21 excuse Mr. McMillan both for hardship and for cause, but I
22 am -- if anybody objects, I will allow him to stay and be part
23 of voir dire as long as it makes any -- as long as nobody tries
24 to poison the pool with questions of him.

25 **MS. NYGAARD:** Your Honor, we believe he already has

1 poisoned the pool by his statement that he has seen guards zero
2 in on particular inmates. That's exactly what this case is
3 about, retaliation against a particular inmate. We feel that
4 the damage has already been done.

5 **MR. LEE:** We have no objection if the Court wants to
6 excuse him.

7 **THE COURT:** I'm going to excuse him, both for cause
8 and for hardship. And I'll let Ms. Zhang go right now and then
9 I'm -- then I'll rattle the names off one more time for the two
10 new people. And then you all can to your thing. And after you
11 to your thing, we'll probably take a break for lunch and do
12 opening statements. And there will be a slightly early break
13 for lunch. After you do your thing, we'll go in and do
14 peremptories and then take a break for lunch.

15 **MR. LEE:** Okay.

16 (Proceedings held in open court.)

17 **THE COURT:** Okay. Mr. McMillan, you are excused.
18 Thank you. Thank you very much for coming in and I'm sorry,
19 again, that we kept you upstairs for a little bit.

20 Ms. Zhang? Is it Zhang?

21 **PROSPECTIVE JUROR ZHANG:** Yes.

22 **THE COURT:** You're also excused. Both of you can go
23 back up to the jury office and let them know that you've
24 completed your jury duty. All right? Thank you.

25 (Prospective jurors exit the courtroom.)

1 **THE COURT:** Now, I am just going to quickly for the
2 two prospective jurors who are new, Mr. Fernandez and
3 Ms. Smith, I'm just going to rattle off the names of the people
4 involved, just in an abundance of caution, to make sure there
5 is nobody involved here who you know or think you may know.

6 Again, my name is Vince Chhabria. My Courtroom Deputy,
7 the person who swore you in, is named Kristen Melen. My law
8 clerk is Rebecca Lee. And Elizabeth Yates here has been
9 passing the microphone. She's an intern here in the building.
10 The two court reporters who will be working this trial are
11 Debra Pas and Belle Ball.

12 The plaintiff's name is Jesse Perez, and the team
13 representing Mr. Perez are Randall Lee, Matthew Benedetto, Tim
14 O'Dwyer and Katie Moran of the Wilmer Hale firm.

15 The defendants in this case are Sean Burris, Anthony
16 Gates, Daniel Gongora, Eric Healy, and Guillermo Pimentel.

17 The attorneys or the team representing the defendants -- I
18 apologize. Is it Pimentel or Pimentel?

19 **MR. PIMENTEL:** It's Pimentel.

20 **THE COURT:** Pimentel, sorry.

21 The attorneys or the team representing the defendants are
22 Jennifer Nygaard, Jocelyn Tucay and Elliott Seals from the
23 California Attorney General's Office.

24 So if you know any of those people I identified or you
25 think you may know any of the people I identified, can you

1 raise your hand?

2 (No response.)

3 Okay. And, Ms. Smith, any connection to the Wilmer Hale
4 firm?

5 **PROSPECTIVE JUROR SMITH:** No.

6 **THE COURT:** Okay, thank you.

7 Let me read you a list of potential witnesses.

8 Judd Anderson.

9 David Barneburg.

10 Susan Hubbard.

11 Rudy Guerrero.

12 Salvador Mendoza.

13 Richard Subia.

14 If you think you might know any of those witnesses, can
15 you raise your hand?

16 (No response.)

17 Okay, very good.

18 So now is the time for attorneys to spend a little bit of
19 time talking to you further, having any follow-up questions
20 they may have of any of you or all of you. And, again, the
21 point of this is to give them a chance to explore your
22 background, probe for any biases, in an effort to form a jury
23 that will be fair and impartial in this case.

24 And so we'll go ahead and begin with the plaintiffs.

25 **MR. LEE:** Thank you, your Honor.

1 Good morning. I know the judge has introduced us already,
2 but just to do it again, my name is Randall Lee. I'm joined by
3 my colleagues, Matthew Benedetto, Katie Moran, and Tim O'Dwyer.
4 Mr. Benedetto and Ms. Moran are attorneys at the law firm where
5 I work and Mr. O'Dwyer is helping us with technology. And it's
6 our privilege to represent our client, Jesse Perez.

7 I know all of you understand the importance of having a
8 fair and impartial jury. I know the judge has told you that,
9 you know, that's our objective. And, really, the purpose here
10 is that all of us have different life experiences and different
11 perspectives and sometimes those experiences and perspectives
12 can make it difficult to be a fair and impartial juror and
13 sometimes those experiences and perspectives may mean that a
14 particular person just wouldn't be a good juror on a particular
15 type of case or involving particular parties. And I know
16 certainly in my case, I mean, I can think of cases where I
17 probably wouldn't -- I'd have a hard time being fair and
18 impartial as well. And so that's why we have this chance to
19 ask some follow-up questions.

20 The nature of this process is such that some of the
21 questions may seem kind of personal. They are not meant to
22 invade your privacy. And so I apologize in advance if it seems
23 like that, but that's how we sort of get at some of these
24 issues.

25 Some of the questions I'll be asking you as a group and

1 some I may have specific follow-up questions for some of you
2 individually.

3 And as the Court told you earlier, if any of the questions
4 I ask make you uncomfortable and you would prefer to answer
5 them privately and not in front of everybody, just please speak
6 up. I know that answering kind of personal questions in a big,
7 grand setting like this can be a little intimidating. So
8 that's really just, you know, the background.

9 I have -- just so you know, I have 30 minutes to ask
10 questions. And then Ms. Nygaard or Mr. Seals will have 30
11 minutes. And then after that, I expect the process will be
12 done and we'll have a jury and we can proceed. So that's what
13 the next hour will look like.

14 So my next question is a group question. That is, I'd
15 like to know if any of you or anyone close to you, family
16 member, close friend and the like, has been a victim of a
17 crime?

18 (No response.)

19 **MR. LEE:** Okay. Has any of you or anybody close to
20 you ever been a witness to a crime?

21 (No response.)

22 **MR. LEE:** Okay. Another group question: Has --

23 **PROSPECTIVE JUROR LARSON:** Do you mean something that
24 came to a trial or do you mean just a crime, let's say, on the
25 street?

1 **THE COURT:** I apologize for interrupting. If I could
2 just remind everybody --

3 **PROSPECTIVE JUROR LARSON:** Oh, Arlo Larson. Sorry
4 there.

5 **THE COURT:** Thanks.

6 **MR. LEE:** I'm really referring to just anything, even
7 if you happen to witness something on the street.

8 **PROSPECTIVE JUROR LARSON:** Oh, okay. I was held up
9 twice at gunpoint in Chicago.

10 **MR. LEE:** Would you tell me a little bit about the
11 experience? How long ago was it?

12 **PROSPECTIVE JUROR LARSON:** It was probably about 35
13 years ago. The person who did it the first time confessed
14 later. I don't know what happened to the second time.

15 **MR. LEE:** And on either occasion were you injured?

16 **PROSPECTIVE JUROR LARSON:** No, I was not.

17 **MR. LEE:** Were -- was it successful and did they take
18 a lot from you?

19 **PROSPECTIVE JUROR LARSON:** They didn't take very
20 much. They took what they could, what we had available at the
21 time in the house.

22 **MR. LEE:** In either case did you end up having to
23 testify or go to court for any reason?

24 **PROSPECTIVE JUROR LARSON:** No.

25 **MR. LEE:** So in the first one, I think you said the

1 individual --

2 **PROSPECTIVE JUROR LARSON:** The police told me later
3 that the individual confessed.

4 **MR. LEE:** And do you know what happened to the
5 individual?

6 **PROSPECTIVE JUROR LARSON:** I don't know what
7 happened.

8 **MR. LEE:** And in the second case you don't know
9 either?

10 **PROSPECTIVE JUROR LARSON:** No, I don't know. I don't
11 think anything happened. I think they got away with it.

12 **MR. LEE:** How did those experiences -- do you still
13 think about those experiences?

14 **PROSPECTIVE JUROR LARSON:** Well, the second time
15 there was a big discussion among the -- there were three of
16 them, and I was -- I and fellow students at the University of
17 Chicago were lying on the floor and then they were discussing
18 whether they were going to shoot me or not and they decided not
19 to.

20 **MR. LEE:** That sounds like a scary experience.

21 **PROSPECTIVE JUROR LARSON:** Yes. It was a traumatic
22 experience.

23 **MR. LEE:** Is that something -- that sense of drama,
24 has it stayed with you?

25 **PROSPECTIVE JUROR LARSON:** Oh, I don't know that it

1 has so much. Once in a while I think about it.

2 **MR. LEE:** Is there anything about having gone through
3 that experience that makes you think that, you know, maybe you
4 wouldn't be a good juror for this case?

5 **PROSPECTIVE JUROR LARSON:** No. I think I could be
6 impartial regardless of that.

7 **MR. LEE:** And, obviously, you will hear that my
8 client has been convicted of a crime. Anything about the
9 experience that sort of carries over that you might think --
10 will make it hard for you to give him a fair trial?

11 **PROSPECTIVE JUROR LARSON:** I don't think there would
12 be anything like that, no.

13 **MR. LEE:** Well, now that the question is clear. Yes,
14 sir.

15 **PROSPECTIVE JUROR MCGOVERAN:** Richard McGoveran. I
16 have been a witness to a crime. I witnessed a drunk driver hit
17 two people in a crosswalk about 20 years ago.

18 **MR. LEE:** And do you know what happened with the
19 case?

20 **PROSPECTIVE JUROR MCGOVERAN:** I did a deposition and
21 the -- the next thing -- well, I got called to court a few
22 times and then it was postponed. Then the next thing I heard
23 was -- I read a newspaper article where she plea bargained and
24 ended up getting, I think, three years.

25 **MR. LEE:** What happened to the two victims?

1 **PROSPECTIVE JUROR McGOVERAN:** The gentleman broke his
2 leg. The young lady was paralyzed from the waist down.

3 **MR. LEE:** How did -- the plea bargain, how did that
4 make you feel?

5 **PROSPECTIVE JUROR McGOVERAN:** Considering, according
6 to the newspaper article that it was her fifth drunk driving
7 and she basically ruined a young lady's life forever, I thought
8 she got off real light, so...

9 **MR. LEE:** Is there anything about that experience
10 that you think will carry over to your ability here to sit on a
11 jury?

12 **PROSPECTIVE JUROR McGOVERAN:** Not with that
13 experience, no.

14 **MR. LEE:** Were you sort of in danger or threatened at
15 all or were you really just sort of an eye witness?

16 **PROSPECTIVE JUROR McGOVERAN:** I was in a vehicle
17 coming the other way.

18 **MR. LEE:** Thank you.

19 Anyone else?

20 **PROSPECTIVE JUROR FERNANDEZ:** Arturo Fernandez. And
21 my uncle was -- he got a DUI and was in prison for about a
22 year, I believe.

23 **MR. LEE:** And how long ago was that?

24 **PROSPECTIVE JUROR FERNANDEZ:** About five years ago.

25 (Court reporter interruption.)

1 **THE COURT:** Mr. Lee, could you get your voice up a
2 little bit so the court reporter can hear you?

3 **MR. LEE:** That was about how long? I'm sorry.

4 **PROSPECTIVE JUROR FERNANDEZ:** That was about five
5 years ago.

6 **MR. LEE:** About five years ago. And he's out of
7 prison now?

8 **PROSPECTIVE JUROR FERNANDEZ:** Yes, he is.

9 **MR. LEE:** Do you recall where he served?

10 **PROSPECTIVE JUROR FERNANDEZ:** No. I don't remember.
11 I'm not sure.

12 **MR. LEE:** Was there anything about that experience
13 that would make it difficult for you to sit on this jury?

14 **PROSPECTIVE JUROR FERNANDEZ:** No, I don't think so.

15 **MR. LEE:** Thank you.

16 We have one more.

17 **PROSPECTIVE JUROR RIEWE:** I have some relatives and
18 friends who were victims of crimes. My great grandfather --
19 I'm kind of removed from all these and they were long ago
20 mostly, so I don't really think it would affect ability to be
21 fair.

22 My great grandfather was murdered. My dad's uncle was
23 beaten up a few times, assaulted. And a friend of mine was
24 also assaulted. And my wallet was stolen a couple of times,
25 but there was no assault or anything.

1 **MR. LEE:** And for the crimes that -- the ones you
2 described, not the also once involving property damage, but the
3 ones that involved either murder or assault, how long ago did
4 those takes place?

5 **PROSPECTIVE JUROR RIEWE:** I think my great
6 grandfather was murdered around 1931. I think my dad's uncle,
7 probably took place in the 60's. And my friend, I don't know.
8 He -- I think it may have been five years ago. I'm not sure.

9 **MR. LEE:** And how about the occasion where your
10 wallet was stolen? How long ago was that?

11 **PROSPECTIVE JUROR RIEWE:** Once was, like, in '82 or
12 '-3 and once was, like, '96.

13 **MR. LEE:** I know that -- I mean, some of the
14 incidents you've described were quite a long time ago, but they
15 also sound like they were obviously extremely serious and, I'm
16 sure, traumatic for your family.

17 Was there anything about those, those experiences, either
18 that you've heard about directly or sort of witnessed, that
19 would make it difficult for you to be a juror in this case?

20 **PROSPECTIVE JUROR RIEWE:** No, I don't think so.

21 **MR. LEE:** Okay. Thank you.

22 **PROSPECTIVE JUROR SOTO:** I have a question. I'm Kim
23 so toe. I've just got a question.

24 In front of my -- in the parking lot that I work at there
25 was a gang shooting. I don't know what all took place. Is

1 that still considered what you're asking about?

2 Because, I mean, I showed up after the -- after all the
3 police and the investigations was there. So, I mean, it was
4 just recently, last couple of months. So I don't know who was
5 involved. I don't -- I don't know.

6 Is that including what you were asking?

7 **MR. LEE:** Well, sure. So you did not witness the
8 actual shooting?

9 **PROSPECTIVE JUROR SOTO:** Right.

10 **MR. LEE:** You came after?

11 **PROSPECTIVE JUROR SOTO:** I came after and all --
12 everything was settled down. They threw -- what I saw was the
13 blood on the ground, that was in the parking lot, and the tape
14 that got thrown away. That was the aftermath.

15 **MR. LEE:** Do you know who the victims were?

16 **PROSPECTIVE JUROR SOTO:** That, I'm not too sure. I
17 didn't even ask. I know they -- that they had a warrant out
18 for their arrests. Last time I was talking to the Livermore
19 police, they had a warrant for other people. They were from
20 two different towns. They met in the middle. That's all I
21 know.

22 **MR. LEE:** And this happened in --

23 **PROSPECTIVE JUROR SOTO:** A parking lot of my work.
24 So the CVS, Orchard, like a few -- Starbucks and the company
25 Safeway, where I work at, is in the same parking lot. They all

1 came and met in the middle. I don't know exactly what -- all I
2 knew is it was just gang involved. That's all I pretty much
3 know. There's two fatals. Two of them were fatal.

4 **MR. LEE:** Anything about the experience that you
5 heard about from people, either just seeing it or hearing about
6 it from other people at work, that would affect your ability to
7 be a juror on this case?

8 **PROSPECTIVE JUROR SOTO:** Yes and no, because it's
9 more of -- yes, because it's more of a stressful part because
10 it's more of an impact on -- for people for dying. I can -- I
11 have people that are -- not through gang related or anything
12 die, but there is -- but no, not really, because it's more of
13 an understanding of what's there, which means in and out of
14 communicating with the people.

15 **MR. LEE:** And just to be clear, so this case is a
16 civil case. And so our client, Mr. Perez, is suing the
17 defendants here, the correctional officers, for money damages.
18 And so it doesn't involve, you know -- and it's a First
19 Amendment case, as the judge said, so it doesn't involve any
20 underlying crime.

21 Do you think that in light of that, it's something -- you
22 know, that you can set aside the experience of the shooting and
23 be a fair and impartial juror?

24 **PROSPECTIVE JUROR SOTO:** I mean, I can try. Because
25 it's -- it just makes it kind of -- with death, that's there.

1 So it's closely. I mean, I can try. So it's -- that's all I
2 can do, is just try.

3 Because, I mean, and, also, the thing like earlier -- I
4 was talking about earlier my mother-in-law's brother has been
5 in and out of jail because of drinking, combination drinking
6 and driving for the DUIs and lost his job. Lost his business
7 of drinking. So that's why he was -- that's why he was in San
8 Quentin, in and out of San Quentin and a few other jails.

9 **MR. LEE:** This is your mother's brother?

10 **PROSPECTIVE JUROR SOTO:** Yes.

11 **MR. LEE:** Who was in San Quentin for a DUI?

12 **PROSPECTIVE JUROR SOTO:** Yes.

13 **MR. LEE:** How long was he in?

14 **PROSPECTIVE JUROR SOTO:** The first time was about
15 three years. The -- there is quite a few times. The shortest
16 time was three years. The longest time was maybe -- maybe
17 about six, seven years, something like that, because of how
18 severe it was.

19 Because, I mean, there's -- I guess there's certain points
20 that you -- for drinking and driving and stuff. So he had to
21 settle all -- some stuff, that I'm not quite too sure what's
22 there.

23 **MR. LEE:** Okay, thank you.

24 Ms. Smith.

25 **PROSPECTIVE JUROR SMITH:** In the interests of being

1 complete, I have had several car break-ins where my car was
2 parked overnight. I assume that's a traditional San Francisco
3 experience. And I did have a wallet stolen 30 years ago when
4 my purse was left unguarded.

5 **MR. LEE:** Yes. I think it's safe to say car
6 break-ins are a way of life here in San Francisco. I know I
7 have sustained a few of them.

8 Anything about those --

9 **PROSPECTIVE JUROR SMITH:** No.

10 **MR. LEE:** -- experiences that's would impact your
11 ability here?

12 **PROSPECTIVE JUROR SMITH:** No.

13 **MR. LEE:** Anyone else have any experience as either a
14 victim or witness? Victim of or witness to a crime?

15 (No response.)

16 **MR. LEE:** Okay. Another question I'd like to ask the
17 group is whether any of you or anyone close to you has ever
18 worked in or been affiliated with law enforcement?

19 **PROSPECTIVE JUROR WILLIAMS:** Any sort of family
20 member?

21 **MR. LEE:** Yes. Yes. You or a family member, close
22 friend?

23 **PROSPECTIVE JUROR WILLIAMS:** My uncle was a police
24 sergeant in Orange County.

25 **THE COURT:** And that's Ms. Williams, right?

1 PROSPECTIVE JUROR WILLIAMS: Yes. Sorry. Yes.

2 MR. LEE: And is he still a police sergeant?

3 PROSPECTIVE JUROR WILLIAMS: He's retired.

4 MR. LEE: How long was he a police sergeant?

5 PROSPECT JUROR WILLIAMS: A long time. I don't know.

6 Probably 20, 25 years.

7 MR. LEE: Do you recall what kind of assignments he
8 had or what his duties were?

9 PROSPECTIVE JUROR WILLIAMS: No.

10 MR. LEE: Is this an uncle you were close to?

11 PROSPECTIVE JUROR WILLIAMS: Yes.

12 MR. LEE: So did he talk to you much about his job?

13 PROSPECTIVE JUROR WILLIAMS: No.

14 MR. LEE: Did he ever tell you stories about sort of
15 a particular case or a particular --

16 PROSPECTIVE JUROR WILLIAMS: No.

17 MR. LEE: -- defendant or anything like that?

18 PROSPECTIVE JUROR WILLIAMS: No.

19 MR. LEE: And anything you would take away from the
20 experience or whatever you heard from your uncle that would
21 affect your ability here to be --

22 PROSPECTIVE JUROR WILLIAMS: No.

23 MR. LEE: -- a juror?

24 PROSPECTIVE JUROR WILLIAMS: No.

25 MR. LEE: Okay. Any other -- anyone else here who

1 has a family member, close friend or yourselves been affiliated
2 with law enforcement?

3 Ms. Soto.

4 **PROSPECTIVE JUROR SOTO:** I'm Kim Soto.

5 I used to work with somebody that became a San Jose police
6 officer. And then my brother-in-law's brother is actually a
7 police officer, but I'm not too sure which town. And I'm not
8 really that close to either one of them.

9 So I'm... So, I mean, I do talk to the one in San Jose.
10 The one that works in San Jose, I do talk to him every once in
11 a while, but we don't really get into detail of what's going on
12 with his work.

13 **MR. LEE:** Okay. Thank you.

14 So there has been a lot of news in the last, you know,
15 months, years about sort of the scrutiny that's been placed on
16 law enforcement and on police officers around the country and,
17 you know, there have been various stories about the conduct of
18 police officers.

19 And I have another question for the group, and that is:
20 Do any of you think that the kind of attention that's placed on
21 police officers can sort of unfairly make it difficult for them
22 to do their job? That police officers are subject to too much
23 second guessing after the fact?

24 Yes, sir.

25 **THE COURT:** Sorry. Could you --

1 **PROSPECTIVE JUROR MCGOVERAN:** Richard McGoveran.

2 **THE COURT:** Thank you.

3 **PROSPECTIVE JUROR MCGOVERAN:** In general, I think
4 it's starting to get out of control. I mean, police officers,
5 correctional officers and stuff, sometimes they got to make
6 split-second decisions that could cost or save somebody's life.

7 So, you know, with all the scrutiny that is going on, you
8 know, I'd hate to see one hesitate if it was my life on the
9 line.

10 **MR. LEE:** Thank you for your candid response.

11 Is there anybody else who shares Mr. McGoveran's view?

12 (No response.)

13 You look like you want to say something?

14 **PROSPECTIVE JUROR LARSON:** This is Arlo Larson again.

15 I can see both sides of this. I think there is a big
16 challenge with the -- I believe the police have been trained in
17 a certain kind of style, an aggressive style to handle
18 problems.

19 I think now that we have these videos and we can see
20 that -- that many police have been misusing their -- what they
21 were able to get away with in the past, I think.

22 So I think it's a positive thing. I would -- I would hope
23 we would have kind of video, pictures of what's happening in
24 probably most confrontational situations. This is a very
25 positive thing.

1 **MR. LEE:** Thank you.

2 And you understand that, of course -- I mean, the
3 incidents you are describing, I assume, have nothing to do with
4 this particular case?

5 **PROSPECTIVE JUROR LARSON:** Right. Nothing at all.

6 **MR. LEE:** And so do you think you would be able to
7 separate in your own mind sort of what you've seen and what
8 your impressions may have been in other cases and still be able
9 to sort of fairly judge the evidence in this case?

10 **PROSPECTIVE JUROR LARSON:** Yes. Yes.

11 **MR. LEE:** Anyone else kind of have views on the
12 larger issue or the views expressed by Mr. McGoveran on the
13 scrutiny that law enforcement officers are sometimes placed
14 under?

15 **PROSPECTIVE JUROR JONES:** Ginette Jones.

16 I just would like to say that, yes, there is this
17 controversy and these issues that are being brought up to the
18 service -- to the surface. But I also recognize there's two
19 sides to every story and being in this room will provide me, at
20 least, with a chance to evaluate the facts and see them for
21 what they are.

22 **MR. LEE:** And thank you for that.

23 And do you have some of the stories, though, about -- I
24 mean, some of the views that Mr. McGoveran expressed, which is
25 police officers have to make split-second decisions. The

1 stakes are sometimes extremely high. Does that really resonate
2 with you?

3 **PROSPECTIVE JUROR JONES:** It does. It does. But I
4 think you need to -- you know, I think there is always that
5 ultimate question of seeing both sides of the story and taking
6 that in consideration, taking all the facts in.

7 And, you know, for us in the population hearing the news,
8 watching the media and the story, we're not always entitled to
9 everything, all the evidence that there is to consider. So I
10 think it's an difficult place to be in most of the time as a --
11 as a viewer.

12 **MR. LEE:** We certainly hope this trial gives you the
13 opportunity to -- for both sides to fully and fairly present
14 the evidence. It's not just a TV show. So, thank you.

15 Another issue I'd like to ask the group about, and that
16 is, you know, this case involves constitutional rights. And
17 specifically it involves constitutional rights for prisoners.
18 And one of the things that you will learn in this trial is that
19 certain constitutional rights apply to people in prison.

20 And so I -- my question is: Does anybody have sort of --
21 does that cause anybody concern or does anybody think that --
22 question why prisoners have constitutional rights?

23 (No response.)

24 **MR. LEE:** Does anybody think that prisoners sometimes
25 just have too many rights; that, you know, whether they are

1 constitutional or not, that prisoners have too many rights?

2 (No response.)

3 **MR. LEE:** Does anybody think that -- or question why
4 prisoners have the opportunity to bring lawsuits? I mean this
5 specific case involves -- the underlying facts involve a
6 lawsuit that was originally brought by Mr. Perez. And, of
7 course, this is now another lawsuit brought by Mr. Perez.

8 Do any of you think that prisoners -- that these are
9 nuisances, prisoners file too many lawsuits?

10 (No response.)

11 **MR. LEE:** Okay. Now, one of the things that will
12 happen in a trial is you will hear from different witnesses and
13 people will testify. What happens in court, what people
14 testify to is evidence. And you'll also see some -- some
15 documents and some other sort of pieces of evidence, documents,
16 photos and that sort of thing. Those are also pieces of
17 evidence.

18 And my question is really -- my next question really goes
19 to testimony, and that is: If you hear -- you may -- you're
20 likely to hear testimony from both our client, Mr. Perez, and
21 the defendants. And if you hear a conflict in testimony or if
22 you hear different versions of what happened from the
23 testimony -- setting aside whatever the documents may show, but
24 just from testimony -- do any of you think, you know, you would
25 just be more likely to believe the defendants because they are

1 correctional officers over my client because he's at Pelican
2 Bay?

3 (No response.)

4 **MR. LEE:** Can any of you imagine a circumstance where
5 you have a -- you would just have a hard time sort of accepting
6 as true what you hear from my client, just because of the fact
7 that he has been convicted of a crime?

8 (No response.)

9 **MR. LEE:** And so I take it from the fact that no one
10 has responded, that all of you can assure me that you will
11 evaluate all the testimony you hear fairly and balance it,
12 taking into account a number of different factors and your own
13 experience without sort of putting too much weight on one side
14 or the other just because of who they are? Is that fair to
15 say?

16 (No response.)

17 **THE CLERK:** You have three minutes.

18 **MR. LEE:** Oh, okay. A few questions specifically.

19 Ms. Smith, can you tell me what kind of law you practiced?

20 **PROSPECTIVE JUROR SMITH:** I practiced business law
21 for a large business firm in the city.

22 **MR. LEE:** And by "business" you mean transactional?

23 **PROSPECTIVE JUROR SMITH:** Yes.

24 **MR. LEE:** Did you ever do any litigation?

25 **PROSPECTIVE JUROR SMITH:** As a very young associate,

1 I did some litigation.

2 **MR. LEE:** What kind of litigation did you do?

3 **PROSPECTIVE JUROR SMITH:** I don't remember them all,
4 it was so long ago. One was a pension case.

5 **MR. LEE:** Thank you.

6 Mr. Patrick?

7 **PROSPECTIVE JUROR PATRICK:** Yes.

8 **MR. LEE:** You talked a little about the experience
9 you had, I think, when you were in law school working at the
10 U.S. Attorneys office in Minnesota.

11 Do I understand it correctly that those were cases where
12 the Government, Department of Justice, was defending cases
13 brought by federal prisoners?

14 **PROSPECTIVE JUROR PATRICK:** The 1982 actions that I
15 mention, yes.

16 **MR. LEE:** And it was all on the defense side?

17 **PROSPECTIVE JUROR PATRICK:** That's correct.

18 **MR. LEE:** So what was your role on those?

19 **PROSPECTIVE JUROR PATRICK:** For the actions I
20 participated in, they were initiated pro se by prisoners. So
21 we would receive the brief, which was usually handwritten. The
22 brief would be given to me for the three or four months where I
23 was the first to act and my job would be to draft the response
24 brief, which would be submitted as sort of competing briefs to
25 the judge for some sort of initial determination. I don't know

1 if it was a procedural determination, whether it was a
2 determination on the merits, whether this was to see whether or
3 not the action would go further.

4 I know I got in the prisoner's brief. My job was to draft
5 the Government's brief in response. Work with the AUSA who was
6 assigned. He or she, depending on who it was, would give me
7 notes and comments back. I would get it in the spot where they
8 were good with it. They would sign and we would submit.

9 And I think in that role I probably was involved in a half
10 dozen, give or take, of which -- I mean, literally what I can
11 remember is one was a complaint about bad food. One was a
12 complaint that the prisoner fell down some stairs and was not,
13 in his mind, medically treated soon enough. And beyond maybe
14 those two things, I don't know that I could tell you anything
15 specific about anything.

16 **MR. LEE:** And, Mr. Patrick, was there -- since you
17 were on the defense side, and so your job was to defend against
18 those lawsuits brought by prisoners, was anything about that
19 experience that you think will make it a hard time for you to
20 judge the case brought by my client fairly?

21 **PROSPECTIVE JUROR PATRICK:** You know, every case is
22 its own case.

23 It's certainly fair to say that for the cases I was
24 involved in, I came to the personal conclusion that I thought
25 that they did not have merit. I don't know what the Court did

1 with them. You know, once I'm done with the brief, it was out
2 of my ambit.

3 But to your question, you know, those were those cases
4 brought by those prisoners at that time. Yours is your
5 client's case brought here. There is nothing about those other
6 cases that, as far as I know, have anything in common with it
7 and it wouldn't matter if they did. This is your case. Those
8 were those cases.

9 **THE COURT:** Mr. Lee, your time is up, but if you want
10 to ask more question to somebody, you can go ahead and do that.

11 **MR. LEE:** Sure. I wanted to ask Mr. Miller a
12 question about your restoration business.

13 Can you tell us a little about how long you have had that
14 business, how it got started? You know, sort of how you --

15 **PROSPECTIVE JUROR MILLER:** Dean Miller.

16 Started -- I got married young. Had a child young. Had
17 to get going. Being on welfare wasn't going to cut it.
18 Couldn't live with my parents. So I started a franchise in
19 restoration. And then subsequently sold that. Started my
20 independent. So that's how I did that and I have been doing
21 that since 1979.

22 Do you want to know about the work we do?

23 **MR. LEE:** Do you have employees? How big a business
24 is it?

25 **PROSPECTIVE JUROR MILLER:** Yes, I do. I've had up to

1 40 employees. Probably about 35 now.

2 **MR. LEE:** And are you generally hired by homeowners
3 or insurance companies or all of the above?

4 **PROSPECTIVE JUROR MILLER:** Yeah, that's a confusing
5 situation. Usually it's technically the homeowner, but we're
6 on programs where the insurance companies give recommendations.
7 So we'll get referred, but I guess technically and legally we
8 work for the homeowner.

9 **MR. LEE:** And does that create sort of a potential
10 conflict or do you ever find yourself caught in the middle
11 between, you know, a homeowner's view of the damage he or she
12 sustained and what the insurance company would like to believe
13 that's what happened?

14 **PROSPECTIVE JUROR MILLER:** Yeah. There's always
15 differences of opinion. Differences of settlements. Things
16 like that. And, luckily, I have employees now and I'm -- I'm
17 not intimately involved in that any more because it's -- it's a
18 tough place to be.

19 **MR. LEE:** And when that happens, what is your role?
20 I mean, what...

21 **PROSPECTIVE JUROR MILLER:** I try to take a stand and
22 say, look, this is what we did. We tried to make it right.
23 And if the homeowner continues to not be happy, I need to
24 get -- you know, I just try to do what I can do to fix it
25 usually. I try to say no. Show my pictures. But ultimately

1 it's customer service and I just -- I give the benefit. I
2 mean, I do -- in business, I mean, I'm looking for a reputation
3 to get ongoing business.

4 **THE COURT:** Okay. Thank you, Mr. Lee.

5 **MR. LEE:** Okay. Okay. Thank you, ladies and
6 gentlemen. We look forward to presenting our case to you later
7 today.

8 **MS. NYGAARD:** Good morning, ladies and gentlemen.

9 Mr. Lee has asked quite a few questions and I'm going to
10 just continue expanding on some of the questions he might have
11 asked or ask some different ones.

12 First of all, by a show of hands, does anybody here ready
13 the San Francisco Bayview publication or have heard of it?

14 Has anyone --

15 **THE COURT:** Wait. Hold on. You have a hand.

16 **MS. NYGAARD:** We do have a hand.

17 **PROSPECTIVE JUROR SMITH:** Nancy Smith. I've heard of
18 it, but I don't read it.

19 **MS. NYGAARD:** In what context have you heard of it?
20 Just in your daily life or professionally?

21 **PROSPECTIVE JUROR SMITH:** Not professionally.

22 **MS. NYGAARD:** Has anybody heard of a publication
23 called *The Rock* or read that?

24 (No response.)

25 **MS. NYGAARD:** And how about *California Prison Focus*?

1 Is anybody familiar with that publication?

2 (No response.)

3 **PROSPECTIVE JUROR SOTO:** This is Kim Soto.

4 I've heard about it. I heard it through the -- my
5 husband's uncle. I just heard about it through him.

6 **MS. NYGAARD:** Okay. Is this the --

7 **PROSPECTIVE JUROR SOTO:** The one I was talking about
8 earlier. He's the one in and out of prison.

9 **MS. NYGAARD:** Are you close with him?

10 **PROSPECTIVE JUROR SOTO:** Not really. On that side of
11 the family, I'm not really that close. The only one I'm close
12 to is my in-laws, but that's -- the only time I really see them
13 is around the holidays. I might touch bases through the year
14 just to find out what's going on, letting them know what's
15 going on with my kids.

16 **MS. NYGAARD:** How did you come to hear about the
17 *California Prison Focus*?

18 **PROSPECTIVE JUROR SOTO:** Around on Christmas Eve he
19 was actually home and he got -- brought it up and one of those
20 times that we kind of -- before -- brought it up just talking
21 with a group of family members that's there.

22 **MS. NYGAARD:** Okay. And had you read the publication
23 yourself?

24 **PROSPECTIVE JUROR SOTO:** No, I haven't.

25 **MS. NYGAARD:** I apologize if I'm pronouncing your

1 name wrong. Ms. Riewe? Riewe?

2 **PROSPECTIVE JUROR RIEWE:** Riewe.

3 **MS. NYGAARD:** Do you do any volunteer work?

4 **PROSPECTIVE JUROR RIEWE:** Yes.

5 **MS. NYGAARD:** And what is that?

6 **PROSPECTIVE JUROR RIEWE:** I volunteer on Monday
7 nights at the Berkeley Free Clinic, just as a -- in the -- a
8 member of the Information Resource Collective, which basically
9 gives out information. When people call and it's something
10 that the limited services of the Berkeley Free Clinic cannot
11 handle, we let them know of other places they could possibly
12 go.

13 **MS. NYGAARD:** Okay. Anybody else, by a show of
14 hands, do any volunteer work?

15 Let's start with Ms. Smith in the back.

16 **PROSPECTIVE JUROR SMITH:** Nancy Smith.

17 I work with environmental organizations.

18 **MS. NYGAARD:** Environmental organizations?

19 **PROSPECTIVE JUROR SMITH:** Yes.

20 **MS. NYGAARD:** Doing what type of work?

21 **PROSPECTIVE JUROR SMITH:** Just advocacy of our
22 issues.

23 **MS. NYGAARD:** Thank you.

24 **PROSPECTIVE JUROR JONES:** I'm Ginette Jones. I just
25 volunteer at my church about once every weight eight weeks.

1 I'm part of the cleaning committee.

2 **MS. NYGAARD:** Thank you.

3 **PROSPECTIVE JUROR MCGOVERAN:** Richard McGoveran.

4 Do some volunteering work through the sponsors through my
5 work. There are different projects for the communities. Most
6 of the ones I do are for underprivileged kids, stuff like that.
7 Like, an example once a year the Salvation Army and my company
8 get together, sponsor money, and we take the kids without their
9 parents into Walmart when the store is closed to shop for their
10 school clothes.

11 **MS. NYGAARD:** That sounds like a great cause.

12 Mr. Patrick?

13 **PROSPECTIVE JUROR PATRICK:** Sure. John Patrick.

14 I'm a board member for the local chapter of the National
15 Association of Minority Contractors.

16 **MS. NYGAARD:** And are you in any leadership position
17 in that board?

18 **PROSPECTIVE JUROR PATRICK:** I'm a board -- there
19 isn't a distinction. There is a president and then there are
20 seven board members. And I -- I guess that I am the de facto
21 legal counsel, although our letter says that I'm certainly not
22 offering any formal legal opinions when I sit on the board.

23 **MS. NYGAARD:** Okay. All right. Thank you.

24 Has anyone here ever been arrested or convicted of a
25 crime? By a show of hands?

1 Yes. Mr. Miller?

2 **PROSPECTIVE JUROR MILLER:** Dean Miller.

3 **MS. NYGAARD:** And if you feel comfortable discussing
4 it out in open court, what were the circumstances?

5 **PROSPECTIVE JUROR MILLER:** It could have been back to
6 your question earlier long ago. This was when I was a
7 teenager. I guess I got a wet reckless. A wet reckless.
8 Driving under the influence. So that's what they called it.
9 That's what I was convicted of, so...

10 **MS. NYGAARD:** And did you serve any time in jail for
11 that.

12 **PROSPECTIVE JUROR MILLER:** Just overnight.

13 **MS. NYGAARD:** And is there anything in particular
14 about that experience, spending a night in jail, that you feel
15 would affect your ability to be a juror on this case?

16 **PROSPECTIVE JUROR MILLER:** No.

17 **MS. NYGAARD:** Has anybody else been arrested or
18 convicted of a crime?

19 (No response.)

20 **MS. NYGAARD:** How about any family members? Have any
21 of your family members served time in prison or jail?

22 **PROSPECTIVE JUROR McGOVERAN:** I have had two
23 different cousins serve time. One five years. The other one,
24 I believe, did ten years.

25 **MS. NYGAARD:** Okay. Let's starts with the first one

1 who did five years. Do you know where they served their time?

2 PROSPECTIVE JUROR McGOVERAN: Vacaville.

3 MS. NYGAARD: And what were they convicted of?

4 PROSPECTIVE JUROR McGOVERAN: Attempted murder.

5 MS. NYGAARD: Were you close with that cousin?

6 PROSPECTIVE JUROR McGOVERAN: When we were younger,
7 yeah, but I ended up moving to southern California. I moved
8 back up in this area after he went in. I did visit him in
9 jail. And I've talked to him since he has been out.

10 MS. NYGAARD: Okay. And is there anything memorable
11 from your visit to the jail that might affect your ability to
12 serve in this case?

13 PROSPECTIVE JUROR McGOVERAN: No.

14 MS. NYGAARD: Did you discuss much with your cousin
15 about his time in prison?

16 PROSPECTIVE JUROR McGOVERAN: Just a general what it
17 was like, yes.

18 MS. NYGAARD: Okay. And you said you also had
19 another cousin who did time in prison?

20 PROSPECTIVE JUROR McGOVERAN: Yes.

21 MS. NYGAARD: Okay. Was that one, you said, ten
22 years?

23 PROSPECTIVE JUROR McGOVERAN: I believe he did ten.

24 MS. NYGAARD: And what was he convicted of?

25 PROSPECTIVE JUROR McGOVERAN: That's -- the family

1 won't exactly say, but it was -- I know he's a registered sex
2 offender. Let me just put it that way.

3 **MS. NYGAARD:** Okay. And are you very close with this
4 cousin?

5 **PROSPECTIVE JUROR MCGOVERAN:** As far as I'm
6 concerned, he does not exist.

7 **MS. NYGAARD:** So I take it you haven't spoken to him
8 about his experience in prison?

9 **PROSPECTIVE JUROR MCGOVERAN:** No, I have not.

10 **MS. NYGAARD:** Okay. Now, I believe before we --
11 Mr. Fernandez had mentioned his uncle had served time in
12 prison. I'd like to just ask a few follow-up questions.

13 So, Mr. Fernandez, you said your uncle was arrested for a
14 DUI, is that correct.

15 **PROSPECTIVE JUROR FERNANDEZ:** Yes.

16 **MS. NYGAARD:** Okay. And do you know how much time he
17 served in prison for that?

18 **PROSPECTIVE JUROR FERNANDEZ:** I want to say it was
19 about a year.

20 **MS. NYGAARD:** And do you know where he was
21 incarcerated?

22 **PROSPECTIVE JUROR FERNANDEZ:** I can't remember.

23 **MS. NYGAARD:** And did you speak to your uncle about
24 that experience in prison?

25 **PROSPECTIVE JUROR FERNANDEZ:** We talked about it a

1 little bit, but it was just general, how it was like and that's
2 pretty much it.

3 **MS. NYGAARD:** Okay? And are you close with this
4 uncle.

5 **PROSPECTIVE JUROR FERNANDEZ:** Not any more.

6 **MS. NYGAARD:** Do you feel that -- that it was fair;
7 that it was right for him to have to go to prison for that
8 crime?

9 **PROSPECTIVE JUROR FERNANDEZ:** Yeah, I believe so. I
10 want to say it was his third DUI offense, second or third.

11 **MS. NYGAARD:** And Ms. Soto?

12 **PROSPECTIVE JUROR SOTO:** Yes. Hi, this is Kim Soto.

13 **MS. NYGAARD:** You mentioned before -- is it your
14 mother-in-law's brother or is it your mother's brother?

15 **PROSPECTIVE JUROR SOTO:** No, it's my mother-in-law.
16 My parents are passed away. It's my mother-in-law. Her
17 brother has been in and out of -- mainly San Quentin, but more
18 than once. I don't know how -- a few times. One, like I said,
19 five years. The other one is a little bit longer.

20 There's other jails there, but I don't remember which ones
21 that he went to. I just try not to bring the subject up
22 because it's a touchy subject for them because it's a drinking
23 and driving. Most of it's drinking and driving, but it's
24 pretty much drinking type of thing.

25 **MS. NYGAARD:** Okay. Now I'm going to ask you the

1 same thing I asked Mr. Fernandez. Do you feel that it was
2 wrong for him to go to prison for the drinking and driving or
3 do you think it was the right thing?

4 **PROSPECTIVE JUROR SOTO:** Well, the thing is is how I
5 -- I'm going to answer it this way. How I teach my kids, if
6 you're going to do the time, you gotta do the crime type of
7 thing [sic], but the thing is if you're going to be in jail,
8 yes, they do have -- they should have rights, too.

9 So, I mean, it's -- if he's going to drink -- I mean,
10 yeah, on rare occasion I do drink, but I stopped to drink that
11 way. If he's going to drink, then he -- he should know his
12 limitations before he starts going behind the wheel or do
13 anything, anything to anybody else or to himself.

14 **MS. NYGAARD:** Okay. Thank you.

15 Is there anybody else who had relatives who spent time in
16 prison?

17 (No response.)

18 **MS. NYGAARD:** Okay. Now, Mr. Lee covered this also,
19 but I would just like to ask if anybody here has any strong
20 feelings about the recent news events involving law enforcement
21 officers that you did not already discuss with Mr. Lee?

22 (No response.)

23 **MS. NYGAARD:** Has anyone here heard of the Mexican
24 Mafia?

25 **PROSPECTIVE JUROR SOTO:** Kim Soto.

1 My mother-in-law's sister lives in Mexico and there is a
2 couple times they brought it up when she was actually up
3 visiting. So I've kind of heard a little, at least a little
4 bit about it and that's it.

5 **MS. NYGAARD:** Okay. That's fine.

6 **PROSPECTIVE JUROR McGOVERAN:** Everyone has kind of
7 heard about it through the news.

8 Richard McGoveran. I think we all kind of heard about
9 that particular phrase before through the media or, you know,
10 along those type of lines.

11 I mean, it's just -- kind of like hearing about any of the
12 other high profile affiliates -- not affiliates, but
13 organizations like that.

14 **MS. NYGAARD:** Okay. Has anyone here ever worked
15 inside of a jail or prison or volunteered inside a jail or
16 prison?

17 (No response.)

18 **MS. NYGAARD:** Do you have any family members or close
19 friends who work inside a jail or prison or who have?

20 (No response.)

21 **MS. NYGAARD:** Have any of you had any experiences
22 with law enforcement that you view to have been either
23 particularly favorable or negative?

24 **PROSPECTIVE JUROR PATRICK:** I don't know that this is
25 additive to what I said before.

1 It's certainly the case that for the two years that I was
2 a law clerk at the U.S. Attorney's Office, I was working with
3 law enforcement officials on a daily basis. Now, it wasn't
4 anyone from Bureau of Prisons. And so I would be talking about
5 ATF agents, FBI special agents, IRS enforcement agents. I was
6 involved in a child pornography case and so that was the U.S.
7 mail service.

8 So I definitely spent a lot of time working with them. I
9 don't know, you know, to what extent that's relevant to a case
10 that involves people who work inside the prisons, but I was
11 certainly working on a daily basis with people in law
12 enforcement at that point in that job.

13 **MS. NYGAARD:** Okay. Anybody else?

14 (No response.)

15 **MS. NYGAARD:** Now, in this case you're going to
16 hear -- you'll probably hear testimony about different prison
17 rules or procedures.

18 If you personally disagree with a particular rule, do you
19 feel that you could set aside that disagreement and still
20 decide this case fairly?

21 (No response.)

22 **MS. NYGAARD:** I guess by a show of hands, is there
23 anybody who wouldn't be able to set aside their feelings if
24 they disagreed with a rule?

25 (No response.)

1 **MS. NYGAARD:** Is anybody here familiar with Pelican
2 Bay State Prison from seeing anything on television about it or
3 hearing things in the news?

4 **PROSPECTIVE JUROR NORTH:** (Raises hand.)

5 **MS. NYGAARD:** Okay. Without going into too much
6 detail, how do you know -- how are you familiar with Pelican
7 Bay?

8 **PROSPECTIVE JUROR NORTH:** Jim North.

9 Just television, news programs. I don't know if it was
10 NBC or CBS had a background story about Pelican Bay Prison,
11 what it was for, the type prisoners they house and such.

12 **MS. NYGAARD:** Okay. Does that --

13 (Court reporter interruption.)

14 **THE COURT:** Ms. Nygaard, sorry to interrupt, but if
15 you could either speak up or sort of point partly towards the
16 court reporter as you're speaking, that would be great.

17 **MS. NYGAARD:** Was that just a general news story or
18 was it, like, a documentary about the inside of Pelican Bay
19 State Prison?

20 **PROSPECTIVE JUROR NORTH:** As I remember, it was a
21 documentary about the inside of the prison.

22 **MS. NYGAARD:** Okay. And do you watch a lot of those
23 types of programs?

24 **PROSPECTIVE JUROR NORTH:** No.

25 **MS. NYGAARD:** I think somebody else had there hand

1 up.

2 Ms. Smith?

3 **PROSPECTIVE JUROR SMITH:** Nancy Smith.

4 I've skimmed some newspaper articles on Pelican Bay.

5 **MS. NYGAARD:** So just from reading the news, have you
6 seen any of the television programs --

7 **PROSPECTIVE JUROR SMITH:** No.

8 **MS. NYGAARD:** -- documentaries?

9 Okay.

10 **PROSPECTIVE JUROR MILLER:** Dean Miller.

11 Pelican Bay that I've heard is just a hearing of it's
12 possibly a high security facility, and that's the extent of
13 what I've heard.

14 **MS. NYGAARD:** So just a little bit of knowledge about
15 the prison, but you haven't gotten any details or anything like
16 that about it, correct?

17 **PROSPECTIVE JUROR MILLER:** No.

18 **MS. NYGAARD:** Okay.

19 Are you now or have you ever been associated with any
20 group or organization that is connected with the operation of
21 jails or prisons, the treatment of prisoners or prison reform
22 within California or anywhere else?

23 (No response.)

24 **MS. NYGAARD:** Anybody? Nobody? Okay.

25 (Brief pause.)

1 MS. NYGAARD: So, Mr. Patrick --

2 THE COURT: Star of our show, I guess.

3 PROSPECTIVE JUROR PATRICK: John Patrick, thank you.

4 MS. NYGAARD: From where do you get most of your
5 news?

6 PROSPECTIVE JUROR PATRICK: A subscription to the
7 *Chronicle* and a subscription to the *Economist*.

8 MS. NYGAARD: Okay. And Ms. Zaidi, we haven't really
9 heard much from you. I will ask you the same question: From
10 what source do you get most of your news?

11 PROSPECTIVE JUROR ZAIDI: What source?

12 MS. NYGAARD: Yes.

13 PROSPECTIVE JUROR ZAIDI: Mostly the TV.

14 MS. NYGAARD: Pardon me?

15 PROSPECTIVE JUROR ZAIDI: You mean news, right?

16 MS. NYGAARD: Yes.

17 PROSPECTIVE JUROR ZAIDI: TV. Television.

18 MS. NYGAARD: Any particular stations?

19 PROSPECTIVE JUROR ZAIDI: Channel 2 news, KTVU.

20 MS. NYGAARD: Local Channel 2.

21 PROSPECTIVE JUROR ZAIDI: Local channel.

22 MS. NYGAARD: Do you watch any national news, cable
23 news channels or anything.

24 PROSPECTIVE JUROR ZAIDI: No, no.

25 MS. NYGAARD: Okay. I think I'll ask Ms. Huang the

1 same question. We haven't heard from her either.

2 **PROSPECTIVE JUROR HUANG:** I read sfgate.com and
3 cnn.com, mostly.

4 **MS. NYGAARD:** And Mr. North, same question for you.
5 Where would you say you get most of your news?

6 **PROSPECTIVE JUROR NORTH:** Most of my news? I would
7 say I get it off the internet, reading the various newspaper
8 publications. I read the *Chronicle* online, *Washington Post*
9 online, *New York Times* online and the *Chicago Centurion*.

10 **MS. NYGAARD:** Okay. I think I'm almost out of time,
11 right?

12 **THE CLERK:** Nine minutes.

13 **MS. NYGAARD:** Oh, nine minutes.

14 **THE COURT:** You don't have to use it all.

15 **MS. NYGAARD:** I don't know if I do. Let me confer
16 with my co-counsel for a moment.

17 (Discussion held off the record between defense
18 counsel.)

19 **MS. NYGAARD:** I don't think we'll take any -- up any
20 more time. Thank you very much.

21 **THE COURT:** Okay. So we are very close to selecting
22 a jury. What we're going to do now is we're going to take a
23 15-minute break for the jurors, and you're free to --
24 prospective jurors, I should say. You're free to go use the
25 restroom or walk around or whatever. Come back here at 11:45.

1 The lawyers can take five minutes and then Kristen will
2 bring you back into the jury room in five minutes and when we
3 come out, we'll be able to tell you who is on the jury and
4 we'll give you some more instructions for how to proceed from
5 there.

6 So stay in your -- remember where you're sitting and
7 return to the same seat when you come back.

8 Thank you.

9 (Whereupon there was a recess in the proceedings
10 from 11:28 a.m. until 11:37 a.m.)

11 (The following proceedings were held in the jury room,
12 outside the presence and hearing of the venire.)

13 **THE COURT:** Okay. I am still inclined to excuse
14 Ms. Soto for cause. I don't think anybody gave us any -- was
15 able to get any assurance out of her that she didn't know
16 anything about the case. I think she probably doesn't, but I
17 don't know for sure, so I think --

18 **MR. LEE:** We would agree.

19 **MS. NYGAARD:** We would agree.

20 **MR. SEALS:** Yes.

21 **MS. NYGAARD:** No objection.

22 **THE COURT:** So anything else before you all start
23 exercising your challenges?

24 **MS. NYGAARD:** Yes. Defendants would like to formally
25 object to just even continuing with this jury, impaneling this

1 jury, based upon Mr. McMillan, No. 24's description of how he
2 was familiar -- how he knew people at San Quentin, officers
3 that targeted in and zeroed in on particular inmates. We feel
4 that that poisoned this entire jury pool.

5 **THE COURT:** Okay. I'm not going to -- so are you
6 moving for a mistrial? What technically is it?

7 **MS. NYGAARD:** We would be, yes. Yeah, we object to
8 this -- you know, any of these jurors being impaneled. So if
9 it is making a mistrial motion, then yes.

10 **THE COURT:** Maybe it's not technically a mistrial if
11 the jury hasn't been impaneled yet, but either way the
12 objection is overruled. I will instruct the jury after --
13 after the jury is selected, that nothing that was said during
14 voir dire can be considered.

15 **MS. NYGAARD:** Okay. Just in general. Not zeroing in
16 on --

17 **THE COURT:** Correct.

18 **MS. NYGAARD:** Right. Okay.

19 **THE COURT:** All right. Do you want to make your
20 first challenge?

21 **MR. LEE:** Yes, we would ask the Court to thank and
22 excuse Juror No. 12, Mr. McGoveran.

23 **THE COURT:** All right.

24 **MS. NYGAARD:** Yes. Defendants would ask to strike
25 Juror No. 4, Ms. Riewe.

1 **THE COURT:** Okay.

2 **MR. LEE:** We would ask the Court to thank and excuse
3 Juror No. 14, Ms. Zaida.

4 **THE COURT:** Okay.

5 **MS. NYGAARD:** Defendants would ask to thank and
6 excuse Juror No. 8, Mr. Larson.

7 **MR. LEE:** We would ask the Court to thank and excuse
8 Juror No. 9, Mr. Patrick.

9 **THE COURT:** Last one?

10 **MS. NYGAARD:** Just one moment.

11 **THE COURT:** Sure.

12 (Brief pause.)

13 **MS. NYGAARD:** Defendants would ask to thank and
14 excuse Juror No. 10, Mr. Miller.

15 **THE COURT:** Hmm-hmm. Okay. So let me --

16 **MS. NYGAARD:** We only get three strikes, right?

17 **THE COURT:** Uh-huh. And you're out.

18 **MS. NYGAARD:** If we may, just hold on one second,
19 your Honor. I was doing the math wrong.

20 **THE COURT:** Okay.

21 **MS. NYGAARD:** And so we just had said No. 10.

22 **THE COURT:** Mr. Miller.

23 (Discussion held off the record between defense
24 counsel.)

25 **MS. NYGAARD:** No. 25 instead of No. 10, Ms. Smith.

JURY VOIR DIRE

1 **THE COURT:** Okay. So you want Mr. Miller on?

2 **MS. NYGAARD:** Correct.

3 **THE COURT:** And you want to use your last challenge
4 on Ms. Smith?

5 **MS. NYGAARD:** Right.

6 **THE COURT:** Okay.

7 **MS. NYGAARD:** Because you're impaneling eight,
8 correct?

9 **THE COURT:** Correct.

10 Okay. So let me -- so I'm just going to announce who the
11 jurors are. Let me make sure I have that right.

12 (Brief pause.)

13 **THE COURT:** Okay. So it will be Dana Williams --
14 make sure I've got this right.

15 Dana Williams.

16 Lynn Branson.

17 Dean Miller.

18 Ginette Jones.

19 Lina Huang.

20 Edward Galbreth.

21 Jim North.

22 And Arturo Fernandez.

23 Is that right?

24 **MR. LEE:** That's what we have.

25 **MR. BENEDETTO:** Yes.

1 **THE COURT:** Okay. So we can go back in. I'll
2 announce that that is the jury. I'll give them a few
3 preliminary instructions, then send them to lunch. Bring them
4 back and you can do your opening statements and we may start
5 with -- I think we probably will start with Mr. Perez.

6 So during the lunch break, after I send them off for
7 lunch, we'll chat about the various objections before you all
8 go to lunch, okay?

9 **MR. SEALS:** Okay. Thank you, your Honor.

10 **MR. BENEDETTO:** Okay. Sounds good.

11 (Proceedings held in open court.)

12 **THE CLERK:** Remain seated. Come to order. Court is
13 back in session.

14 **THE COURT:** Okay. As promised, we have a jury before
15 the lunch hour. And I'm going to call out the names of the
16 people who are serving on the jury. People who will stay, and
17 be with us for a little while.

18 Dana Williams, Lynn Branson, Dean Miller, Ginette Jones,
19 Lina Huang, Edward Galbreth, Jim North, and Arturo Fernandez.
20 You will be on the jury.

21 If you can all stay where you are for the moment, I would
22 like to thank everybody else for coming. Really, appreciate
23 your time. I'm glad we were able to let you go before the
24 lunch break.

25 You can just head back up to the jury office on the 19th

1 Floor and tell them your jury service has been completed and
2 that I have released you, and very much appreciate it. Thank
3 you.

4 (Jury Venire excused)

5 **THE COURT:** Okay. Now we're are going to do a little
6 bit of rearranging. You don't have to stay there for the while
7 trial. So what I would like to do is sort of keep everybody in
8 the same order they're seated, but move them down.

9 So what that means is you're in Seat No. 1, so you stay
10 there.

11 Ms. Branson, why don't you move down and sit next to
12 Ms. Williams in Seat No. 2.

13 And then, Mr. Miller, why don't you sit in the seat
14 immediately behind you, which is Seat No. 3.

15 And then Ms. Jones, why don't you sit next to Mr. Miller
16 in what is Seat No. 4.

17 And then, Ms. Huang, you're next, right? Why don't you
18 come sit down here, in what we will now call Seat No. 5. What
19 we find is that -- yeah, down here at the end.

20 What we find is that for the eight jurors it's best for
21 you all to be sitting as close as possible. If at some point
22 you are having trouble seeing and you want to rearrange your
23 seating you can, but we find that this is usually the best way
24 to go.

25 So Mr. Galbreth, if you will have a seat next to

1 Ms. Huang, and then Mr. North next to Mr. Galbreth. And
2 Mr. Fernandez, after Mr. North.

3 There we go. Okay. So, the first thing that I'll do now
4 that we have you as jurors is have Kristen swear you in yet
5 again. The oath you took this morning was to be a prospective
6 juror.

7 And we have a special and perhaps equally
8 difficult-to-understand oath for you to take as actual jurors.

9 So Kristen, do you want to swear them in?

10 **THE CLERK:** Please stand and raise your right hands.

11 (Jury Panel sworn in)

12 **THE CLERK:** Thank you.

13 **THE COURT:** Okay. So, I'm going to give you a little
14 bit of instruction right now. Then we are going to do our
15 lunch break as promised. And bring you back, do a little more
16 instruction.

17 We will start with opening statements today. And, you
18 will probably begin to hear from the first witness today. And
19 as I said, we will get you out of here, some time between 2:00
20 and 2:30, and for sure, no later than 2:30.

21 Let me also go over the schedule with you again, just in
22 case you're paying more attention now than you were this
23 morning when you weren't sure if you were even going to be on
24 this jury.

25 We start at 8:30 sharp every morning. I have the lawyers

1 come in before 8:30 and I come in before 8:30 so if there's any
2 business that we need to deal with, we are not wasting your
3 time, and we get you in as close to 8:30 as we can. Breakfast
4 is available in the jury room.

5 At the end of today, Kristen will bring you back to the
6 jury room, give you your badges, and sort of show you around
7 back there, show you the drill, get your contact information,
8 all of that stuff. Light breakfast is available every morning,
9 so you can come in early and get a bite if you want.

10 As I said, we'll take one or two morning breaks, depending
11 on how things are going, and a break for lunch usually for 45
12 minutes, and then have you out of here between 2:00 and 2:30
13 every day.

14 We don't have trial on Thursdays. Thursday's the day for
15 me to deal with all the other cases we have here on the docket
16 and for the lawyers to do any trial prep work that they need to
17 do.

18 We anticipate it will be around a week. We can't
19 guarantee you exactly how long it will last, but as I said, we
20 anticipate it will be around a week. There's a very real
21 possibility that you will have to come in next week, but I can
22 assure you this case is not going to go past Thanksgiving. Nor
23 will you have to be here on Thanksgiving.

24 So that's the schedule. Let me take a couple of minutes
25 to talk to you about your duties as jurors. And give you some

PRELIMINARY INSTRUCTIONS

1 general instructions about being a juror.

2 **PRELIMINARY INSTRUCTIONS**

3 **THE COURT:** At the end of trial, I'll give you more
4 detailed written instructions about the law, and how to apply
5 the law. And when we come back from lunch I'll give you a bit
6 more instruction on the evidence and how to view the evidence.
7 But for now, let me just sort of make some general comments.

8 When you deliberate, it will be your duty to weigh and to
9 evaluate all the evidence received in the case, and in that
10 process to, decide the facts. And as I said earlier, you find
11 the facts, but to the facts as you find them, you will apply
12 the law as I give it to you, whether you agree with the law or
13 not.

14 You must decide the case solely on the evidence, and the
15 law before you. And you must not be influenced by any personal
16 likes, or dislikes, opinions, prejudices, or sympathy.

17 Please do not take anything I may say or do during the
18 course of trial as indicating what I think the evidence is,
19 what I think of the evidence, or what I think your verdict
20 should be. that is entirely up to you.

21 Similarly, don't take anything that anybody has said up to
22 this point as evidence of anything. Right? I mean, what was
23 said in voir dire during the jury selection process by me, by
24 the lawyers, by the other prospective jurors, none of that is
25 relevant to your consideration. None of that is evidence. You

PRELIMINARY INSTRUCTIONS

1 are to do your best to put that out of the your mind and decide
2 the case based on the evidence you are going to begin hearing
3 this afternoon.

4 Keep an open mind throughout the trial. And don't decide
5 what the verdict should be until after you and your fellow
6 jurors have completed your deliberations at the end of the
7 case. And the point of that is that all the evidence doesn't
8 come in at once, and you want to consider all of it before you
9 reach a decision.

10 And because you must decide the case based only on the
11 evidence that you receive here in the courtroom, and on my
12 instructions as to the law that applies to the case, you must
13 not be exposed to any other information about the case or to
14 the issues it involves during the course of your jury duty.

15 So that is until the end of the case, or unless I tell you
16 otherwise, do not communicate with anyone in any way, and do
17 not let anyone else communicate with you in any way about the
18 merits of the case or anything to do with it. This includes
19 discussing the case in person, in writing, by phone or
20 electronic means, by email, text messaging, over the internet,
21 on a blog, on a website or anything else.

22 This applies to communicating with your fellow jurors,
23 until I give you the case for deliberation. And it applies to
24 communicating with anybody else, including your family members,
25 your employer, the media, the press, people involved in the

1 trial.

2 Now, of course, that restriction, you've got to -- you
3 know, there has to be some limit to that restriction, otherwise
4 people are going to be calling the authorities wondering where
5 you are, right? So it's okay to tell your family members or
6 your employer that you are on jury duty. Okay? And it's okay
7 to tell them what you anticipate the schedule to be, and when
8 you expect to be available and when you don't expect to be
9 available.

10 Other than that, though, the problem is that people are
11 really tempted to ask you questions about the case. People get
12 excited to hear when you are on jury duty and when you are on a
13 jury. So if people start asking you followup questions:
14 What's the case about, who's the plaintiff, who are the
15 defendants, what's your impression, anything like that, just
16 tell them the that you are under strict orders from me not to
17 respond to any questions, and that you are only permitted to
18 talk about the fact that you are on jury duty and scheduling
19 matters relating to that. You are not allowed to talk about
20 anything else with respect to the case, and the Judge has
21 specifically ordered you not to say anything further.

22 Now, after I release you from jury duty, you are then free
23 to discuss, to talk about the case. But until then it is
24 critical that you don't.

25 Another specific word about social media, Twitter,

PRELIMINARY INSTRUCTIONS

1 Facebook, whatnot. Obviously, that's a big issue these days.
2 And you know, it might be tempting to just say something on
3 Facebook along the lines of "Just got picked for a jury."
4 Right? Which is slightly more interesting than "Just did my
5 laundry" or some of the other things that people put on
6 Facebook all the time.

7 But you really shouldn't even do that. Because, you know,
8 you can control what you say, but you can't control what people
9 say back to you. Right? And, you know, who knows what
10 somebody is going say on Facebook into -- in response to your
11 statement "Just got picked for a jury." That would be
12 inappropriate for you to hear. So, just entirely stay off
13 social media when it comes to your jury service. Okay?

14 If you are asked anything about the case, or about your
15 jury service, if you are approached by anyone, and you're
16 concerned that it's problematic or somebody's a little too
17 curious, report it to me and Kristen immediately so that we can
18 look into it. Okay?

19 As I said, the law requires these restrictions to enhad is
20 that your the parties have a fair trial based on the same
21 evidence that each party has had an opportunity to address.
22 And so the other thing that that means is no outside research,
23 right? Don't search the internet, don't do any outside
24 research, don't look at dictionaries.

25 You are supposed to sort of -- I don't expect there to be

PRELIMINARY INSTRUCTIONS

1 anything out there on this case, necessarily, but you should
2 not be searching for it. You should be limiting your
3 consideration to the evidence that you hear in this courtroom.
4 And it's important that every juror consider the same evidence.
5 Absent that, you know, the parties are denied a fair trial.
6 And, if you violate these restrictions, a mistrial could result
7 that would require the entire trial process to start over.

8 One other thing, you know, on this issue of communicating
9 with other people, you know, we, the lawyers and the other
10 members of the teams are under strict instructions not to have
11 any communication or interaction with you whatsoever.

12 So from time to time, you know, you might be in the
13 hallway getting in the elevator and -- and/or let's say you're
14 in the elevator, and the door opens, and one of the lawyers is
15 there, and they start to walk in, and they see you. And they
16 turn around and they walk out and they wait for the next
17 elevator. That's not because they are being rude, right? And
18 if they avoid making eye contact with you, that's not because
19 they're being rude; that's because they are under strict
20 instructions from me not to interact with the jurors in any
21 way. Even if -- a wink or a smile or whatever. So please
22 don't take any of that the wrong way.

23 So for now as I said, what we will do is give you a lunch
24 break. We will have you come back here at 12:45. We will have
25 a little bit more of the trial, you will hear opening

1 statements and hear from the first witness. And then, at the
2 end of our day, Kristen will take you back there, you will get
3 your badges, you will -- she will show you around, get your
4 contact information, et cetera.

5 But for now we'll do a 45-minute lunch break. I'll stay
6 here with the attorneys and do some work with them while you
7 are having your lunch break. There is a cafeteria downstairs
8 on the second floor. And then there are a few things, you
9 know, close by, sandwiches and stuff like that within a
10 one-block radius of the courthouse, should you want to venture
11 out.

12 So with that, I'll see you back here at 12:45. Thank you.

13 (Jury excused)

14 (The following proceedings were held in open court,
15 outside the presence and hearing of the jury.)

16 **THE COURT:** Okay, do you want to talk about the
17 evidentiary objections to the exhibits that come in with
18 Mr. Perez?

19 The defense has had a chance to articulate the objections.
20 Do you persist in all of those objections or --

21 **MS. NYGAARD:** Yes, Your Honor. We do.

22 **THE COURT:** Okay. So, why don't we just do it in
23 numerical order.

24 **MR. BENEDETTO:** Sure, Your Honor.

25 **THE COURT:** As I said, the objection to Exhibit 2 is

1 overruled.

2 Exhibit 10, all right. Remind me what Exhibit 10 is
3 again.

4 **MR. BENEDETTO:** It is the outline of an article that
5 was not seized on October 10, so it was an article that
6 remained in Mr. Perez's cell. And we would offer it as
7 evidence of -- that shows he was likely to have similar
8 articles that day in his cell.

9 We're not offering it for the -- its contents.

10 **THE COURT:** Right. Well, so, I would think, I mean,
11 if they -- I mean, I would think that that would come in to
12 rebut something, some suggestion that they make. But, I'm not
13 sure -- what suggestion are you anticipating that they are
14 going to make that would render this relevant?

15 **MR. BENEDETTO:** That there were no articles in his
16 cell that day, and therefore, they weren't confiscated.

17 **THE COURT:** Well, so, to the extent that it would be
18 needed to rebut a suggestion on their part that there were no
19 articles or evidence of articles in the cell, that sounds like
20 it would be relevant. But are you intending to elicit
21 testimony along those lines?

22 **MS. NYGAARD:** That there were no articles in his
23 cell? No, Your Honor. The defendants will testify that all
24 paperwork was confiscated.

25 **THE COURT:** Uh-huh.

1 **MR. BENEDETTO:** I think this is different, because I
2 mean, this is again a -- representative of the kind of specific
3 article that we are alleging was confiscated.

4 **THE COURT:** Right. That objection is sustained. It
5 can be revisited if they suggest something that's directly
6 contrary to the presence of this article in his cell.

7 Exhibit 12, settlement agreement.

8 **MR. BENEDETTO:** Yes. Your Honor, first of all, we
9 think that the settlement agreement is the best evidence of the
10 language of the settlement which the defendants have put at
11 issue.

12 **THE COURT:** Can you show me the language that is
13 important to you in this agreement?

14 **MR. BENEDETTO:** Sure. It would be on Section 2(3) on
15 Page 2. Under "Terms and Conditions."

16 **THE COURT:** Okay.

17 **MR. BENEDETTO:** "In consideration for plaintiffs's
18 release..."

19 **THE COURT:** Let me just read it to myself real quick.

20 **MR. BENEDETTO:** Okay.

21 Okay, this agreement had not been reached by October 12,
22 right?

23 **MR. BENEDETTO:** Correct.

24 **THE COURT:** So, is there going to be any dispute that
25 as of October 12th, they agreed in principle to what's

1 contained in Paragraph 3?

2 **MS. NYGAARD:** I don't think that anybody can testify,
3 because -- to whether they had agreed in principle except, I
4 guess, Mr. Perez.

5 **THE COURT:** Well, Mr. Perez can.

6 **MS. NYGAARD:** Mr. Perez. But none of the defendants
7 or any of the defendants' witnesses had any involvement in
8 negotiating this settlement agreement in any way.

9 **THE COURT:** Right.

10 **MS. NYGAARD:** What defendants will offer is evidence
11 that Pelican Bay was informed there was a settlement agreement,
12 but they will also testify that they know today, sitting here
13 today, that there actually was not an executed settlement
14 agreement in place.

15 **THE COURT:** Well, what they know today doesn't really
16 seem relevant. But I guess here's my question about the
17 settlement agreement.

18 It doesn't seem to me that there's any dispute that they
19 reached an agreement in principle, if not a signed agreement,
20 to do a new gang validation proceeding.

21 **MR. BENEDETTO:** Right.

22 **THE COURT:** And he can testify that they reached an
23 agreement, a settlement agreement to do a new gang validation
24 proceeding, and he can testify, I presume, that they reached
25 that agreement in principle by October, and they put it to

1 writing later on. Right?

2 **MR. BENEDETTO:** Correct.

3 **THE COURT:** So why does this actual document have to
4 be in? I mean, if they -- if they dispute that, then I would
5 think that the document would become relevant to support his
6 assertion, perhaps. But, why does the document actually need
7 to be in?

8 **MR. BENEDETTO:** We think that one of the -- you know,
9 one of the strategies by the defendants will be to discredit
10 Mr. Perez, discredit his credibility and his testimony with
11 respect to the prior lawsuit.

12 And it's -- and, and this -- we should be entitled to show
13 the jury something that is -- corroborates that testimony and
14 is a legal document. A real document that they could, you
15 know, look at and read.

16 **THE COURT:** Well, I'm sure they're going to try to
17 discredit him generally, but why does this need to come in if
18 they don't try -- if they don't dispute the point that he had
19 an agreement with the state that required them to do a new gang
20 validation procedure?

21 **MR. BENEDETTO:** If, if that point is not in dispute,
22 and there is no question about the timing of the validation and
23 which regulations apply, because that's why the language, "New
24 gang validation procedures under current departmental
25 regulations," we understand what that language means, but the

1 jury may not.

2 **THE COURT:** Right.

3 **MR. BENEDETTO:** As long as that has not been
4 disputed, then, and beyond sort of rehabilitating Mr. Perez's
5 credibility, that's what we would seek to use this document
6 for.

7 **THE COURT:** So my sense, though, is that they are not
8 disputing that. They're just going to make a pitch to the jury
9 about what -- about what the -- these defendants knew about the
10 situation.

11 **MR. BENEDETTO:** Right.

12 **THE COURT:** They're not going dispute that he had
13 that deal with the state. Right?

14 **MS. NYGAARD:** Correct. Defendants will just testify,
15 you know, to what degree, if any, you know, that they knew he
16 had a settlement agreement, and what they knew any of those
17 terms to be.

18 **THE COURT:** Right. Okay. So, I mean, same ruling, I
19 think, sustained, subject to -- you know, I mean, you can put
20 it in, if they say anything that you can refute with the
21 settlement agreement. Or if they, you know, attack his
22 credibility on that point that we have been discussing. Okay?

23 Next?

24 **MR. BENEDETTO:** Is Exhibit 15. One of the
25 photographs of the interior of the cell.

1 **THE COURT:** Uh-huh.

2 **MR. BENEDETTO:** One thing I would say here is that --

3 **THE COURT:** Who took the picture?

4 **MR. BENEDETTO:** This is a picture that we obtained
5 from a public source. We had --

6 **THE COURT:** Is there a dispute as to the authenticity
7 of this? I know you say that it's irrelevant and prejudicial
8 but --

9 **MS. NYGAARD:** It appears to be a cell in the SHU, but
10 I don't have any -- I mean, I guess people could testify that
11 that's what a SHU cell looks like. But I have no idea where
12 they got from this from, or who took the photograph when, and
13 et cetera.

14 **MR. BENEDETTO:** And our client can certainly testify
15 that this is a fair and accurate depiction of not only a SHU
16 cell, but a SHU cell at Pelican Bay.

17 **THE COURT:** Okay.

18 **MR. BENEDETTO:** One of the reasons that we are
19 seeking to use this photo is that we don't have a good interior
20 photo of Mr. Perez's cell that was occupied that day. We had
21 invited the CDC to take a picture of Mr. Perez's cell from the
22 inside to show the interior. We don't have a good photo. And
23 so in the absence of that, we are seeking to use this.

24 I would note the defendants were willing to stipulate to
25 the use of this photo (Indicating), if the image could be

1 reversed, you know, if the sink could be shown on the other
2 side. But that's not possible.

3 **MS. NYGAARD:** And Your Honor, if -- defendants would
4 stipulate that plaintiffs have produced a photo that was an
5 occupied cell with belongings in that. We had stipulated to
6 that.

7 **THE COURT:** Why is that?

8 **MS. NYGAARD:** This just makes it look like an inmate
9 is thrown in a concrete slab with nothing. I mean, there's a
10 mattress folded over, if that. It's not representative of how
11 an inmate lives in a cell. They put up pictures, and going to
12 clothing and bedding and personal items.

13 **THE COURT:** If you really cared about that, couldn't
14 you get to that in cross-examination? Or there's your own
15 defendants, for that matter, if you think that actually
16 matters.

17 From a forest-from-the-trees standpoint, if you think that
18 actually matters, can't you establish that?

19 **MS. NYGAARD:** Correct. But I would also like to
20 point out that when they said that we -- they invited us to
21 give them a picture, they never sought a picture during
22 discovery. They never, to my knowledge, asked Pelican Bay if
23 they could go in and see Mr. Perez's cell and take a photograph
24 of the cell. So --

25 **THE COURT:** I still don't understand -- I need to

1 look at your objections. Did you object to its authenticity?

2 MS. NYGAARD: Yes.

3 THE COURT: And you continue to object to its
4 authenticity.

5 MS. NYGAARD: Yes.

6 THE COURT: Okay. So how are you going to lay the
7 foundation for the picture?

8 MR. BENEDETTO: I would show it to Mr. Perez and have
9 him testify about --

10 THE COURT: Did Mr. Perez take the picture?

11 MR. BENEDETTO: He did not.

12 THE COURT: Okay. Who took the picture?

13 MR. BENEDETTO: We -- we don't know who took the
14 picture because it was obtained from the internet.

15 THE COURT: Who obtained it from the internet?

16 MR. BENEDETTO: Members of my team. But Mr. Perez
17 certainly can testify as to his experience inside a SHU cell,
18 that this is an accurate depiction of what such a cell looks
19 like.

20 We are not -- would not be claiming that this was in fact
21 the cell he occupied, but that it is a depiction of --

22 THE COURT: I'm going to allow you to use it as a
23 demonstrative. But it's not going to be admitted into
24 evidence.

25 Exhibit 17?

1 **MR. BENEDETTO:** Yes. So, one of the issues that is
2 in dispute, particularly with respect to the RVR, is what the
3 officers could see happening inside the cell on that day. And,
4 this is a photo that shows -- that is relevant because it shows
5 how perforated the door is, and sort of what a view into such a
6 cell would be.

7 This is not Mr. Perez's cell. And we're not claiming that
8 it is. But again, we don't have a picture of his actual cell
9 that shows the perforations quite as clearly as this does.

10 **MS. NYGAARD:** Your Honor, again we would object for
11 lack of authentication. Also relevance. And, Rule 40 --

12 **THE COURT:** I mean, what's -- relevance, he just
13 articulated the relevance of it.

14 **MS. NYGAARD:** Well, relevance to show this particular
15 cell. It's not plaintiff's cell. It's not the cell that's in
16 dispute or anything.

17 **THE COURT:** Is it a cell from -- similar to the
18 plaintiff's?

19 **MS. NYGAARD:** Yes.

20 **THE COURT:** Is it from Pelican Bay?

21 **MS. NYGAARD:** It appears to be.

22 **MR. BENEDETTO:** (Nods head)

23 **THE COURT:** Okay.

24 **MS. NYGAARD:** But I don't know.

25 **THE COURT:** Where did the picture come from?

1 **MR. BENEDETTO:** Members of my team, again, obtained
2 it from the internet.

3 **THE COURT:** I mean, the problem -- I mean if you
4 wanted to get -- if you wanted to put into evidence -- I don't
5 think the picture of the empty cell is that big of a deal.

6 But if it's in dispute how you can see into the cell, you
7 know, you could have gotten through discovery an actual picture
8 of the actual door to Mr. Perez's cell or some cell that was
9 similar to it. And, you know, you could have -- you could have
10 obtained that from them or you could have, you know, figured
11 out a process for taking a picture, yourselves.

12 But to just say, like, you know, "A member of our team
13 pulled this picture from the internet, and we assert that it is
14 like Mr. Perez's cell," I mean, you have an
15 authenticity/foundation problem, I think, that they're not --
16 you know, I mean, I think perhaps it's a little bit
17 unreasonable of them not to just see the forest from the trees
18 and withdraw their objection to this, but they're objecting to
19 it on authenticity and foundation grounds.

20 **MR. BENEDETTO:** Right.

21 **THE COURT:** So, what am I to do?

22 **MR. BENEDETTO:** So, the threshold showing that I
23 understand is that it needs to be a fair and accurate depiction
24 of the exterior -- of the door.

25 Jesse, our client, can lay the foundation, can testify

1 because he went in and out of the door, what a door looked
2 like. The defendants can testify about whether this is a fair
3 and accurate depiction of an exterior door and how perforated
4 it is.

5 And we believe we can lay the foundation and the
6 defendants can cross-examine Mr. Perez on his recollection of
7 what that door looked like. And they can also adduce their own
8 testimony about whether this is an accurate depiction of the
9 door.

10 **THE COURT:** Let me -- I'll think about that and let
11 you know before opening statements.

12 Same issue with 19 -- is it 19?

13 **MR. BENEDETTO:** 19.

14 **THE COURT:** Same issue?

15 **MS. NYGAARD:** Yeah. This one particularly, no
16 relevance, Your Honor. This doesn't have anything to do with the
17 cell that the officers came and searched or that resulted in
18 the issuance of an RVR because of what was going on inside the
19 cell.

20 This is a hallway within -- inside the prison. It appears
21 to be, I should say, because again, lack of authentication.
22 But it appears to be a hallway within the SHU at Pelican Bay
23 that inmates would not go down on a daily basis -- I mean,
24 this, it has no relevance to what happened in Mr. Perez's cell
25 that day.

1 **THE COURT:** But they're just trying to sort of set
2 the stage and sort of show the jury what things look like. I
3 mean, what's the big deal?

4 **MS. NYGAARD:** We believe this would go more towards
5 the damages phase if we get to that, not liability. It has no
6 relevance to what happened inside Mr. Perez's cell that day.

7 **MR. BENEDETTO:** This photo along with a couple of the
8 photos that are coming up are relevant to our ability to show
9 the magnitude of the threat that our client faced, the -- one
10 of the elements is chilling effect.

11 And we believe that we are entitled to show and have the
12 jurors appreciate visually what it would mean to be in the SHU.
13 And our client will testify that he saw this corridor as he
14 went to the law library. He can lay the foundation for the
15 photo in that way.

16 And --

17 **THE COURT:** And same thing --

18 **MR. BENEDETTO:** Same thing for 20 and --

19 **THE COURT:** Somebody from your team took that picture
20 or pulled that from the internet?

21 **MR. BENEDETTO:** Correct.

22 **THE COURT:** And same with 20?

23 **MR. BENEDETTO:** And 21, yes.

24 **THE COURT:** And 21. Okay. 25.

25 **MR. BENEDETTO:** Is the diagram of the rotunda.

1 **THE COURT:** Uh-huh.

2 **MR. BENEDETTO:** So we had asked for a diagram of the
3 rotunda to be provided. We don't have one. so Mr. Perez drew
4 this, based on his experience being there. He can certainly
5 lay the foundation for it's -- it's a fair and accurate
6 depiction of the space that he occupied.

7 Part of the story is where Mr. Perez and Mr. Guerrero were
8 moved from the cell to a separate cell. And, the diagram would
9 be relevant to allowing the jury to sort of appreciate where
10 various events happened on the day of October 10th.

11 **MS. NYGAARD:** Again Your Honor, plaintiffs did not
12 make a discovery request for rotunda diagram or pictures. They
13 only asked for it when we were finalizing pretrial documents.

14 **THE COURT:** But he could draw a diagram for the jury
15 while he is on the stand if they wanted to, right?

16 **MS. NYGAARD:** Right.

17 **THE COURT:** To help explain. Are you really saying
18 that you want to make him draw the diagram again when he is on
19 the stand, as opposed to using this one?

20 **MS. NYGAARD:** No, I'm just saying a diagram is not
21 relevant to --

22 **THE COURT:** You're saying he can't draw a diagram
23 when he's on the stand?

24 **MS. NYGAARD:** No, he --

25 **THE COURT:** To try and explain sort of the layout of

1 where he was?

2 **MS. NYGAARD:** No, I'm not saying that.

3 **THE COURT:** Okay. So the only difference is that
4 maybe -- and I didn't see a hearsay objection in there, but
5 maybe this is hearsay because it is an out-of-court writing.
6 Right?

7 **MS. NYGAARD:** Correct.

8 **THE COURT:** And you were going to tell me that what
9 you want is you want him to draw it again while he is on the
10 stand, instead of using this one.

11 **MS. NYGAARD:** No, I think this could be admitted with
12 -- and then obviously defendants could, you know, interject in
13 their examinations of what's wrong with this, what's -- you
14 know, if anything.

15 **THE COURT:** Okay. So are you still objecting to the
16 use of this diagram?

17 **MS. NYGAARD:** Yes.

18 **THE COURT:** Why?

19 **MS. NYGAARD:** Still, on the basis of relevance. I do
20 not believe that it is relevant at all to --

21 **THE COURT:** Okay, so you don't have a hearsay
22 objection in your objections that you filed, so it's overruled.
23 You waived -- waive that objection.

24 Okay. What's next?

25 **MR. BENEDETTO:** 26, Your Honor. The picture of the

1 cage that was used as the law library.

2 **THE COURT:** Okay.

3 **MR. BENEDETTO:** A part of Mr. Perez's testimony, part
4 of the narrative will be how he learned enough of the law to
5 file his 2005 lawsuit. He did so in a cage that looked very
6 much like this. He can testify that this is the sort of cage
7 that constituted the prison law library at Pelican Bay.

8 We are not asserting that this is the actual cage, but it
9 is certainly a fair and accurate depiction of what the law
10 library was.

11 **THE COURT:** Okay. I'm sustaining that objection
12 because I don't -- I think it's tangential to what you are
13 trying to prove here.

14 **MR. BENEDETTO:** And the final exhibit will be 77.

15 **THE COURT:** Okay. Yeah, so we already dealt with
16 this in the motion in limine.

17 What is the problem, other than your objections that you
18 made in the motion in limine?

19 **MS. NYGAARD:** We would also add that it's hearsay.

20 **THE COURT:** Right, but it's not being offered to
21 prove the truth of what's asserted in there, so it's not
22 actually hearsay.

23 Anything else?

24 **MS. NYGAARD:** Nothing else.

25 **THE COURT:** Okay. And you didn't submit a proposed

1 pinpoint instruction on this?

2 **MS. NYGAARD:** No, we didn't.

3 **THE COURT:** Okay. So that's overruled.

4 Okay. Thanks. So we will see you back here at 12:45.

5 **MR. BENEDETTO:** Thank you, Your Honor.

6 **THE CLERK:** Court is in recess.

7 (Luncheon recess taken from 12:24 p.m. to 12:51 p.m.)

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PRELIMINARY INSTRUCTIONS

P R O C E E D I N G S

NOVEMBER 16, 2015

12:51 P.M.

(The following proceedings were held in the presence
of the jury)

THE CLERK: Remain seated, come to order. Court is
back in session.

THE COURT: Okay. Welcome back. We're going to
proceed with opening statements in just a moment. Let me first
give you a few additional instructions on how to consider the
evidence.

And as I said, you will get a bunch more detailed
instructions on the law, and also on how to consider the
evidence in writing, after the -- at the close of the case and
when you go into your deliberations. But for now, let me just
share a couple of basic points.

PRELIMINARY INSTRUCTIONS

THE COURT: This is a civil case, and the burden of
proof in a civil case for most issues, including the issues
that you are going to start hearing about now, is preponderance
of the evidence. Which is different from reasonable doubt, and
I'm quite sure the lawyers will talk to you more about that in
their opening statements.

But when a party has the burden of proof on any claim by a
preponderance of the evidence, it means you must be persuaded
by the evidence that the claim is more probably true than not.

PRELIMINARY INSTRUCTIONS

1 You should base your decision on all of the evidence,
2 regardless of which party presented it.

3 There are multiple defendants in this case. You should
4 decide the case as to each defendant separately.

5 Unless otherwise stated, the instructions will apply to
6 all parties, but you should apply -- decide the case as to each
7 defendant separately.

8 What is evidence. The evidence you will consider in
9 deciding what the facts are consist of the sworn testimony of
10 any witness, the exhibits which are received into evidence, and
11 any facts to which the lawyers have agreed.

12 In reaching your verdict, you may only consider the
13 testimony and exhibits received into evidence. Certain things
14 are not evidence, and you may not consider them in deciding
15 what the facts are. We have discussed this a little bit
16 before, but let me just list them.

17 Arguments and statements by lawyers are not evidence. The
18 lawyers are not witnesses. What they say in their opening
19 statements, what they say in their closing arguments and at
20 other times is intended to help you interpret the evidence.
21 But, it is not evidence. If the facts as you remember them
22 differ from the way the lawyers have stated them, your memory
23 controls.

24 Questions and objections by lawyers are not evidence.
25 Attorneys have a duty to their clients to object when they

1 believe a question is improper under the rules of evidence.

2 You should not be influenced by the objection or by the Court's
3 ruling on the objection.

4 Testimony that has been excluded or stricken or that you
5 have been instructed to disregard is not evidence, and must not
6 be considered.

7 In addition, sometimes testimony and exhibits are received
8 only for a limited purpose. When I give you an instruction, a
9 limiting instruction, you must follow it.

10 Anything you may have seen or heard or will see or will
11 hear when court is not in session is not in evidence. You are
12 to decide the case solely based on the evidence received at
13 trial.

14 As I said, sometimes evidence will be admitted for a
15 limited purpose. And, when I instruct you that an item of
16 evidence has been admitted for a limited purpose, you must
17 consider it only for that limited purpose, and no other.

18 Let's talk for a minute about direct and circumstantial
19 evidence. Evidence can be direct or circumstantial. Direct
20 evidence is direct proof of a fact such as testimony by a
21 witness about what that witness personally saw, or heard, or
22 did. Circumstantial evidence is proof of one or more facts
23 from which you could find another fact. And I'll explain a
24 little bit more about that in a second.

25 But, you can -- can and should consider both kinds of

1 evidence. The law makes no distinction between the weight to
2 be given to either direct or circumstantial evidence.

3 It's for you to decide how much weight to give to any
4 evidence. And so, you know, a good example of this is if you
5 wake up in the morning and you walk out of your house and you
6 see that the ground is wet, that's pretty good evidence that it
7 rained the night before. It's circumstantial evidence. It's
8 not direct evidence. Because you didn't see it raining. You
9 didn't hear it raining. But you walk out the next morning and
10 you see that the ground is wet. And there is, of course, a
11 possibility that that could have happened some other way, but
12 it's pretty good circumstantial evidence that it rained last
13 night.

14 Direct evidence is if you wake up in the middle of the
15 night and you hear the rain, and/or you look out the window and
16 you see it raining. That is direct evidence. If you came and
17 testified in court about that you would be providing direct
18 evidence that it rained last night.

19 And as I said, the law doesn't make distinctions between
20 the weight you give to direct evidence versus circumstantial
21 evidence. That's for you to decide.

22 There are rules of evidence that control what can be
23 received into evidence. When a lawyer asks a question or
24 offers an exhibit into evidence, and a lawyer on the other side
25 thinks it's not permitted by the rules of evidence, the lawyer

PRELIMINARY INSTRUCTIONS

1 may object. If I overrule the objection, the question may be
2 answered or the exhibit received. If I sustain the objection,
3 the question cannot be answered and the exhibit cannot be
4 received. Whenever I sustain an objection to a question, you
5 must ignore the question and must not guess what the answer
6 might have been.

7 Sometimes I may order as I said earlier that evidence be
8 stricken from the record and that you disregard or ignore the
9 evidence. That means that when you are deciding the case, you
10 must not consider the evidence that I told you to disregard.

11 In deciding the facts of this case you may have to decide
12 which testimony to believe and which testimony not to believe.
13 You may believe everything a witness says, or part of it, or
14 none of it. Proof of a fact does not necessarily depend on the
15 number of witnesses who testify about it.

16 In considering the testimony of any witness, you may take
17 into account the opportunity and ability of the witness to see
18 or hear or know the things that the witness testifies to; the
19 witness's memory; the witness's manner while testifying; the
20 witness's interest in the outcome of the case, and any bias or
21 prejudice; whether other evidence contradicted the witness's
22 testimony; the reasonableness of the witness's testimony in
23 light of all the evidence; and any other factors that bear on
24 believability.

25 The weight of the evidence as to a fact does not

PRELIMINARY INSTRUCTIONS

1 necessarily depend on the number of witnesses who testify about
2 it.

3 During deliberations, you will have to make your decision
4 based on what you recall of the evidence. You won't have a
5 transcript of the trial. I urge to you pay close attention to
6 the testimony as it is given. If at any time you can't hear or
7 see the testimony, or the evidence, or a chart or a questions
8 or arguments, let me know so that I can correct the problem.

9 Notes. Kristen has provided you with pens and note pads.
10 If you wish, you may take notes to help you remember the
11 evidence. If you do take notes, please keep them to yourself
12 until you and your fellow jurors go to the jury room and decide
13 the case.

14 Do not let note-taking distract you. When you leave, your
15 notes should be left in the jury room. No one will read your
16 notes. They will be destroyed at the conclusion of the case.

17 Whether or not you take notes, you should rely on your own
18 memory of the evidence. Notes are only to assist your memory.
19 You should not be overly influenced by your notes or those of
20 your fellow jurors.

21 And let me just say that, you know, occasionally some of
22 us tend to want to write everything down. Everything the
23 professor says in the lecture, we want to write it down. We
24 don't want to miss anything. We want to make sure we didn't to
25 get anything. But if you concentrate too much on taking too

1 many notes you are more likely to miss stuff.

2 So I would urge you if you're the type of person who
3 really wants to take notes, be judicious in the notes that you
4 take, and don't just be writing stuff furiously in an effort to
5 get everything down because that will cause to you miss things.
6 Including witness demeanor and things like that.

7 So with that, as I said, you will get more detailed and
8 written instructions at the close of the case before you begin
9 your deliberations. But for now, we will begin with opening
10 statements. Each side has 30 minutes to make an opening
11 statement. We will be strict about these the time limits.

12 So, we'll begin with the plaintiff, if the plaintiff
13 wishes to proceed.

14 **MR. LEE:** Thank you, Your Honor. We have one
15 demonstrative, if the Court will allow.

16 (Photograph displayed)

17 **OPENING STATEMENT**

18 **BY MR. LEE:**

19 May it please the Court, counsel, ladies and gentlemen of
20 the jury.

21 Imagine a maximum-security prison deep in the words up in
22 northern California near the Oregon border, about 400 miles
23 north of here, far from the public eye. And imagine within
24 this prison, there's an even higher security area called the
25 security housing unit, or the SHU.

1 And imagine that inside the SHU are rows and rows of tiny
2 concrete cells, cells surrounded on three sides by concrete,
3 and with a steel door with teeny little holes in it facing out
4 onto a hallway.

5 And imagine that inside each of these cells sits a
6 prisoner who spends 22 and a half hours a day in that cell. He
7 eats all his meals alone in his cell because his meals are
8 handed to him through a little slot in the metal door. His
9 only break is to go a small yard about the size of a dog run,
10 surrounded by 20-foot-high walls, where the only piece of
11 equipment is a pull-up bar.

12 And imagine that the rest of the time, the prisoner sits
13 in his cell, hour after hour, day after day, month after month,
14 year after year. And then imagine what it would be like to do
15 that for ten years.

16 Ladies and gentlemen, that was the life that my client,
17 Mr. Perez, lived. For ten years, he spent 22 and a half hours
18 a day inside a tiny concrete cell. And for nine of those
19 years, he sat alone, until he was finally given a cellmate
20 after almost a decade of solitary confinement.

21 Now, how did Mr. Perez end up in the SHU? He ended up
22 there because back in 2003, when he was a prisoner at another
23 prison, he was determined by prison officials there to have
24 been what's called an associate of a prison gang. Not a
25 member, but an associate of a prison gang. And based on that

1 determination alone, he was sent to the SHU at Pelican Bay,
2 where he sat for the next ten years.

3 Now, one of the things you will learn about at this trial
4 is that the U.S. Constitution guarantees certain rights all of
5 us, including prisoners at Pelican Bay. And one of those
6 rights that the U.S. Constitution guarantees to all of us is
7 the right to file lawsuits against prison officials. It's part
8 of the First Amendment to the Constitution which protects
9 freedom of speech. And it applies even to an inmate in a
10 maximum-security prison. And that's what this case is about.

11 Now, even though Mr. Perez was locked away in the most
12 isolating circumstances imaginable, he didn't give up hope. He
13 wanted to educate himself. And he wanted to be able to stand
14 up for and protect his own rights in the proper manner. And so
15 he studied and he read and he learned the law and he learned
16 the Constitution.

17 And in 2005, he filed a lawsuit against prison officials,
18 alleging that the procedures whereby he was determined to have
19 been an associate of a prison gang and sent to SHU indefinitely
20 were a violation of his constitutional rights.

21 The Department of Corrections fought that lawsuit for
22 seven years. But finally, in 2012, Mr. Perez won what he
23 viewed as a tremendous victory. He learned that the state
24 wanted to settle the lawsuit. And that settlement gave him the
25 opportunity to finally get out of the SHU after nearly a

1 decade.

2 And that's where the defendants come into play. Because
3 when the defendants, Mr. Gongora, Mr. Healy, and Mr. Pimentel
4 and Mr. Gates and Mr. Burris (Indicating) learned about the
5 settlement, they decided to teach my client a lesson. They
6 wanted to show him what happens when you challenge the system.
7 And they crossed a line.

8 And the evidence in this case will show that they abused
9 their authority, they tried to intimidate him, and they
10 retaliated against him. And thereby, violated his
11 constitutional rights yet again. And that's what this case is
12 all about. And that's why we're here today.

13 Let me tell you a little more about Mr. Perez. Mr. Perez
14 was raised in a town about 60 miles east of Los Angeles, a town
15 called Colton.

16 When he was 11 or 12, his abusive father abandoned the
17 family, leaving his --

18 **MS. NYGAARD:** Objection, Your Honor. Relevance and
19 argumentative.

20 **THE COURT:** Overruled.

21 I'll just remind the jury that argument by lawyers in
22 opening statements is not evidence. sometimes lawyers have a
23 tendency to promise certain evidence in their opening
24 statements.

25 But what you have to focus on is not what the lawyers

1 promise to you, but the evidence that is delivered to you on
2 the witness stand. So just keep in mind for both sides, that
3 arguments by lawyers, opening statements by lawyers, are not
4 actual evidence. It's a preview of what the lawyers believe
5 the evidence will show.

6 **MR. LEE:** And Mr. Perez will tell you about his
7 background. When he was 11 or 12 his abusive father left the
8 family, leaving his mother to raise him and his three siblings.
9 He has a brother who served honorably in the United States
10 Army. And two sisters. And to this day, he remains close to
11 his siblings and his mother.

12 But after his father left, Mr. Perez made some bad
13 decisions. And he fell in with the wrong crowd. And when he
14 was 15 years old, he was charged with a felony. He was
15 eventually convicted. And he was sent to the California Youth
16 Authority.

17 When he turned 18, he was sent to state prison, to
18 Tehachapi, California. And it was there at Tehachapi that
19 several years later he was determined by prison officials
20 through a process known as a gang validation procedure, he was
21 determined or validated as an associate of a prison gang. And
22 I'll explain a bit later, you know, what the validation process
23 means.

24 And with that decision, his life changed dramatically,
25 because that validation sent him to the SHU at Pelican Bay. He

1 wasn't told whether or when he would ever get out.

2 Now, at the SHU, Mr. Perez will tell you that some inmates
3 literally go crazy. But Mr. Perez didn't. Mr. Perez realized
4 that in order to be able to protect his own rights, in order to
5 be able to stand up for what is right, he needed to learn the
6 system. He needed to learn how to, in the proper manner,
7 protect his rights.

8 And so with nothing more than a seventh-grade education
9 because he had dropped out of school after seventh grade, he
10 learned to read and write. He learned the law; he learned the
11 legal system. He learned the Constitution.

12 And with incredible perseverance and determination, and
13 hard work and reading, he learned and determined after several
14 years that he had what he believed was a good basis for a
15 lawsuit against prison officials for that validation.

16 And so in 2005, he filed lawsuit, as I mentioned before,
17 against prison officials, alleging that the procedures that
18 were followed for determining that he was a prison gang
19 associate and for sending him to the SHU for an indefinite
20 period of time were unconstitutional.

21 The Department of Corrections tried to fight the case.
22 The case dragged on for years. Department of Corrections tried
23 to get the case thrown out of court. But Mr. Perez prevailed,
24 using briefs that he written by hand. And eventually, after
25 many years, in 2012, in the summer of 2012, he learned that the

1 state wanted to settle the case.

2 And the key term of the settlement -- the settlement
3 provided for payment of a modest amount of money, which
4 Mr. Perez will tell you he gave to his mother.

5 And the key term was that he would have the opportunity to
6 go through a new gang validation procedure under new rules that
7 were coming into effect that he knew about. And that
8 validation, that new procedure under these new rules would give
9 him the opportunity to finally get out of the SHU after nine
10 and a half years.

11 Now, let me pause there and just explain a little more
12 about this procedure and about why it would have given him the
13 opportunity to get out of the SHU.

14 Historically, the process of validation, an inmate could
15 be validated as either a prison gang associate, which was the
16 case with Mr. Perez, or a prison gang member, based on certain
17 pieces of evidence that prison officials will look for. It
18 could be a name in an address book. It could be a letter.
19 Prison guards read mail to look for correspondences with
20 potentially other prison gang members. It could be a drawing;
21 it could be a tattoo.

22 And based on that evidence, alone, prison gang officials
23 could make the determination that somebody was an associate or
24 a member of a prison gang. And based on that determination,
25 alone, some -- a validated member or associate would be sent to

1 the SHU, indefinitely. Don't know when or whether you will
2 ever get out.

3 Several years ago there was a growing amount of criticism
4 of the practice of long-term solitary confinement. And there
5 was a widely-publicized hunger strike at Pelican Bay in 2011,
6 criticizing practices in the SHU.

7 **MS. NYGAARD:** Objection --

8 **THE COURT:** Overruled.

9 **MR. LEE:** And one of the conditions at Pelican Bay
10 that was the subject of the hunger strike was the validation
11 practice. The practice of automatically sending a validated
12 prison gang associate or member to the SHU.

13 And so, over time, the California Department of
14 Corrections developed -- began to develop a new policy, a new
15 validation policy. And this new policy provided that simply
16 being a validated gang member or associate was not enough to
17 get you sent to the SHU. In order to be sent to the SHU, you
18 also had to have engaged in some violation, in a serious
19 violation of prison rules.

20 So in other words, that the test wasn't just affiliation
21 or association or membership. There also had to have been some
22 actual misconduct, in order for a prisoner to go to the SHU.

23 That new policy was critical to Mr. Perez. Because
24 Mister -- Mr. Perez knew at the time of these events, Mr. Perez
25 knew that he did not have on his record a serious violation of

1 prison rules. And therefore, he knew that if he went through a
2 new gang validation procedure, he would have the opportunity to
3 finally get out of the SHU. And that's why the settlement was
4 such a tremendous victory for him. That's why it was so
5 important to him, because he knew that that would give him the
6 pathway out of the SHU.

7 And the matter should have ended there, with a settlement,
8 and a path out of the SHU for Mr. Perez. But that's when the
9 defendants decided to take matters into their own hands, and
10 send Mr. Perez the message. The defendants were members of a
11 unit at Pelican Bay called the Institutional Gang Investigation
12 Unit. You will hear that term a lot. IGI. And the defendants
13 held the title Assistant Institutional Gang Investigator, AIGI.
14 And during the relevant time, you will hear that there were
15 seven AIGIs, and five of whom were the defendants.

16 The AIGIs and that unit is responsible for investigating
17 and finding evidence that could lead to somebody being
18 validated, and therefore, either being sent to or having -- in
19 the case of the Pelican Bay SHU, having to remain within the
20 SHU. And so the -- the defendants, members of that unit, would
21 review people's mail, search cells, monitor the activities of
22 prisoners. And if they found sufficient evidence, they would
23 compile a package and that -- their actions and that
24 determination could lead to somebody being sent to or having to
25 remain in the SHU.

1 And it was on October 10, 2012, that these defendants
2 learned of the settlement, and decided to send Mr. Perez a
3 message. On October 10th, 2012, Mr. Gates, Mr. Healy,
4 Mr. Pimentel, and Mr. Gongora showed up at Mr. Perez's cell to
5 do a cell search. And it wasn't just any cell search. It was
6 a search to look for evidence for purposes of a validation
7 procedure. It was to look for evidence of an association with
8 a prison gang.

9 But Mr. Perez wasn't expecting a cell search that day. He
10 wasn't due for -- you will hear there is a regular review. He
11 wasn't due, wasn't due for his regular review. And he learned
12 that the settlement that he had learned about wasn't yet in
13 effect because this was October of 2012, and the settlement
14 wasn't actually signed until June of 2013, eight months later.
15 And he knew that the new policy for gang validations wasn't in
16 effect yet either.

17 You will hear evidence that during the search, the
18 defendants made comments that demonstrated their intent to
19 retaliate against Mr. Perez. You will hear that defendant
20 Gates said to Mr. Perez, "You might have been able to collect
21 from us, but you better get comfortable because we are going
22 make sure you stay where you belong."

23 You will hear that one of the defendants in the process of
24 searching the cell said, "These knuckleheads should file
25 lawsuits more often. Makes this job that much more rewarding."

1 You will hear that defendants trashed Mr. Perez's cell and
2 violated prison regulations in the process, prison regulations
3 that govern how cell searches are to be conducted. And you
4 will hear that they destroyed his paperwork; you will hear that
5 he confiscated his legal papers. You will hear that they
6 confiscated articles he had written that were critical of the
7 Department of Corrections. Materials that were never returned
8 to him, again, contrary to prison regulations.

9 Now, you won't see any photos of the cell search.
10 Mr. Perez and inmates generally aren't allowed to have cameras
11 in prison. You will hear that the defendants did have a
12 camera, but they won't show you any pictures either.

13 What you will hear, however, is the testimony of two
14 eyewitnesses, two other inmates, who will testify about what
15 they saw and heard that day. First you will hear from an
16 individual named Rudy Guerrero. Rudy Guerrero was Mr. Perez's
17 cellmate at the time. Remember, in his tenth year, he finally
18 got a cellmate.

19 And Mr. Guerrero will tell you about comments he heard.
20 Mr. Guerrero will tell you that one of the defendants said to
21 him "Are you into filing lawsuits too"? And when he said no,
22 the defendant said "Good. Keep it that way."

23 And he will tell you too how the cell that he shared with
24 Mr. Perez was trashed, and how Mr. Perez's papers were taken.

25 And you will also hear from Mr. Mendoza. Salvador Mendoza

1 occupied the cell right next to Mr. Perez and Mr. Guerrero.
2 And, he could hear what was going on through vents in the
3 ceiling. And he will tell you he heard comments that the
4 defendants were making, and he will tell you he heard the
5 tearing of papers --

6 (Reporter interruption)

7 **MR. LEE:** Tearing of papers, the ripping of papers,
8 and the trashing of the cell.

9 But there's more. Several days after the cell search,
10 defendant Gates issued a report, what's called a Serious Rules
11 Violation Report, to Mr. Perez, claiming that he had improperly
12 interfered with the search.

13 And remember how I told you one of the new -- the key
14 features of this new policy was that in order to be sent to or
15 remain in the SHU, you had to have not only affiliation or
16 association with a prison gang, but you also had to have some
17 affirmative misconduct, a violation, a serious violation of
18 prison rules. And remember how I told you that Mr. Perez knew
19 at the time he did not have had in his record any serious
20 violation of prison rules. The evidence will show that that's
21 why the defendant -- defendant Gates issued this report. To
22 make sure that Mr. Perez stayed right where he belonged, to use
23 their words, in the SHU, 22 and a half hours a day.

24 Now, I expect you will hear that defendants were just
25 doing their jobs. They were following orders. And I expect

1 you will hear that the defendants will say they didn't even
2 know who Mr. Perez was. But we will show you evidence that
3 will prove that Mr. Perez was already under close scrutiny by
4 the AIGIs, by the very unit that the defendants worked in.

5 And we will show you that he had come to their attention
6 in the past. We will even show you an email that was sent a
7 year beforehand to several AIGIs, including defendant Pimentel,
8 asking the AIGIs to do a retaliatory cell search on Mr. Perez,
9 on Mr. Perez, himself.

10 And we will show you and we will explain to you prison
11 regulations and rules that govern how cell searches are to be
12 conducted, how property is to be handled. And, and the like.

13 And as for the RVR, the Serious Rules Violation Report,
14 Mr. Perez challenged that, as he was entitled to do. And he
15 was found not guilty of that charge, by an independent prison
16 hearing officer. Proof that it was issued for a retaliatory
17 purpose.

18 **MR. SEALS:** Objection, argumentative.

19 **THE COURT:** Overruled.

20 **MR. LEE:** Ladies and gentlemen, the defendants
21 weren't just doing their jobs. The evidence will show that
22 they deliberately retaliated against Mr. Perez because he had
23 dared to exercise his constitutional rights. The very same
24 rights that protect all of us.

25 Now, at the conclusion of this case, after you have seen

1 and heard all of the evidence, my colleague, Mr. Benedetto,
2 will speak to you. And he will ask you to decide this case
3 fairly and impartially, based on the law and the facts as you
4 have heard them. And he will ask you to uphold the principle
5 that the First Amendment protects everyone, even prisoners at
6 Pelican Bay.

7 We will ask you to return a verdict in favor of Mr. Perez,
8 and against each of the defendants (Indicating).

9 Thank you.

10 **OPENING STATEMENT**

11 **BY MR. SEALS:**

12 Good afternoon, ladies and gentlemen of the jury.

13 We promise that by the end of this case, the evidence will
14 show you three important things: The defendants were following
15 standard procedure when they searched Mr. Perez's cell. The
16 defendants were following standard procedure when they
17 confiscated gang-related materials from Mr. Perez's cell. And
18 the defendants were following standard procedure when they
19 issued Mr. Perez an RVR, otherwise known as a Rules Violation
20 Report, for interfering with their ability to secure evidence
21 during the cell search.

22 My name is Elliott Seals. I was introduced to you earlier
23 today. You also met my co-counsel, Jennifer Nygaard and our
24 paralegal, Jocelyn Tucay. I would also like to take a moment
25 to introduce you to each of the defendants. Officer Sean

1 Burris will testify that he was involved in the review of
2 Mr. Perez's paperwork.

3 Officer Jim Pimentel will testify that he was also
4 involved in the review of Mr. Perez's paperwork, and that he
5 was involved in the search of Mr. Perez's cell.

6 Sergeant Eric Healy, who was an officer at the time of the
7 incident, he will testify that he was involved in the search of
8 Mr. Perez's cell.

9 Counselor Dan Gongora, who WAS also an officer at the time
10 of the incident, will testify that he was involved in the
11 search of Mr. Perez's cell.

12 And Officer Anthony Gates --

13 **SERGEANT GATES:** Sergeant.

14 **MR. SEALS:** Sorry. Sergeant Anthony Gates, who was
15 an officer at the time of the incident, and will testify that
16 he was involved in the search of Mr. Perez's cell, and that he
17 issued Mr. Perez an RVR because of Mr. Perez's conduct during
18 the cell search.

19 You have heard that Mr. Perez claims that these officers
20 conspired to retaliate against him, and did retaliate against
21 him, because of a lawsuit that Mr. Perez had previously filed.

22 The lawsuit Mr. Perez previously filed was not against
23 officers at Pelican Bay State Prison. It was against officers
24 at another prison. Mr. Perez claims that these officers
25 retaliated against him by trashing his cell, issuing a false

1 Rules Violation Report, and by confiscating articles and a
2 legal document from his cell.

3 But I ask that you pay careful attention to the evidence.
4 The evidence will show that these officers were following
5 standard procedure when they searched Mr. Perez's cell. They
6 were following standard procedure when they confiscated
7 documents from Mr. Perez, that were related to gang activity.
8 And they were following standard procedure when they issued
9 Mr. Perez a Rules Violation Report.

10 I would like to take a moment to give you some background
11 on Pelican Bay State Prison. As you heard, Pelican Bay State
12 Prison is a maximum-security prison. And the evidence will
13 show that the SHU at Pelican Bay, sometimes referred to as the
14 SHU, is a special unit within Pelican Bay State Prison.
15 Inmates that have been determined to be members or associates
16 of prison gangs such as the Mexican Mafia are housed there.
17 And inmates who have been -- who have shown themselves to be
18 violent while in prison are also housed there.

19 The defendants were gang investigators. As gang
20 investigators, their duties included reviewing inmates' gang
21 status. One thing about inmates that were housed in the
22 Security Housing Unit at that time is that every six years the
23 defendant was housed there because of their gang status, they
24 would receive a review of that gang status.

25 Officers Pimentel and Burris were assigned to review the

1 status of inmates who had been assigned to the Security Housing
2 Unit because of their gang status.

3 You will hear that there were regulations in place to
4 combat gang activity within the prisons, and that standard
5 procedures were required in order to determine -- sorry. That
6 standard procedures were required when evaluating the gang
7 status of inmates and when reviewing documents to determine if
8 they amounted to evidence of gang activity.

9 Next I will tell you what the evidence will show happened
10 on October 10, 2012. You are going to hear testimony that
11 Officers Burris and Pimentel, as reviewers of inmates' gang
12 status, received an email from their supervisor. This email
13 simply informed them that Mr. Perez needed to receive a new
14 gang validation, otherwise known as a review of his gang
15 status, because of a settlement or a court order in a previous
16 lawsuit that Mr. Perez had filed. These officers were
17 instructed to prepare a new validation for Mr. Perez as soon as
18 possible.

19 You are going to hear testimony from Officers Pimentel and
20 Burris that they did not know Mr. Perez at the time that they
21 received this email from their supervisor. There may be some
22 testimony regarding paperwork that Officer Burris or Officer
23 Pimentel had prepared in the past regarding Mr. Perez. But
24 they will testify that that paperwork did not require them to
25 meet Mr. Perez, and they did not have any interaction with

1 Mr. Perez when preparing that paperwork.

2 You will also hear testimony about an email that
3 Mr. Pimentel received at some point. He received this email
4 over a year before the incidents at issue in this case.

5 Now I want you to pay close attention this. He received
6 an email from another officer at Pelican Bay. An officer that
7 is not a defendant in this case. This email did ask him to do
8 a cell search on an inmate because -- because that other
9 officer did not like the inmate.

10 But when Mister -- Mr. Pimentel will tell you that when he
11 came into the prison that day, and saw this email in his
12 in-box, he immediately forwarded it to his supervisor. He told
13 his supervisor that he had received this inappropriate email.
14 And he did not ignore this email, nor did he go through what
15 was requested of him in that email. Instead, he followed
16 standard procedures and did what he was trained do and reported
17 it to his supervisor.

18 You are going to hear that after Officers Pimentel and
19 Burris were ordered to prepare a new validation of Mr. Perez,
20 as soon as possible, Officers Pimentel, Healy, Gongora and
21 Gates proceeded to search Mr. Perez's cell. It was standard
22 procedure for a cell search to be conducted while preparing a
23 gang validation.

24 The purpose of that procedure, you will hear, was so that
25 any gang-related evidence could be found in the cell. You will

1 hear that it was standard procedure for four officers to go to
2 a cell when there were two inmates within the cell.

3 Mr. Perez had a cellmate, Mr. Guerrero. So, four officers
4 went down to his cell. The Security Housing Unit is a special
5 section of the prison, as I mentioned. That means that there
6 is high security there. And inmates cannot be released from
7 their cell unless they are placed into handcuffs.

8 So when these officers arrived at Mr. Perez's cell, they
9 first instructed Mr. Perez and his cellmate to submit to
10 handcuffs. In addition to that, standard procedure was for one
11 of these officers to turn off the water so that the toilet
12 cannot be used to dispose of any evidence or other items in the
13 cell as they were going into the cell to search for evidence.

14 You will hear that when these officers arrived at the
15 cell, Mr. Perez and Mr. Guerrero did not fully comply with
16 orders. The evidence will show that Mr. Guerrero began tearing
17 up notes and sticking them into the toilet, trying to destroy
18 them so that they could not be read by the gang investigators
19 after they had searched the cell.

20 You will hear that while Mr. Perez's cellmate Mr. Guerrero
21 was putting notes into the toilet, Mr. Perez was moving around
22 the cell in a manner so that he could block the view of the
23 defendant officers so that they could not see what Mr. Guerrero
24 was doing.

25 He was also moving around and blocking the hole in the

1 door, which is known as a food port. That hole can be used to
2 gain compliance with orders, if necessary.

3 Based on the conduct of Mr. Perez and his cellmate
4 Mr. Guerrero, you are going to hear that Mr. Gates wrote a
5 Rules Violation Report. He wrote this report up for Mr. Perez
6 and for his cellmate Mr. Guerrero. Mr. Guerrero was written up
7 for destroying evidence for putting it into the toilet. And
8 Mr. Perez was written up for interfering with their ability to
9 conduct a job -- to conduct their job and to secure evidence
10 during cell searches.

11 You are going to hear that inmates are provided due
12 process while in prison. That means that the Rules Violation
13 Report requires a hearing before an inmate is found guilty or
14 not guilty.

15 You are going to hear testimony that Mr. Perez's cellmate
16 was found guilty of the Rules Violation Report issued against
17 him, but Mr. Perez was found not guilty of his Rules Violation
18 Report.

19 However, the evidence will show that Mr. Gates did not do
20 anything wrong by issuing this Rules Violation Report. You are
21 going to hear from the hearing officer who found Mr. Perez not
22 guilty, and he will testify that it is standard procedure for
23 officers to issue a Rules Violation Report to both inmates in a
24 cell when one of them has engaged in conduct that violated
25 prison regulations. This is standard procedure so that an

1 investigation can be conducted into both of the inmates'
2 activities.

3 You heard -- I'm sorry. Mr. Perez may state that he was
4 issued a Rules Violation Report several days later. But
5 Mr. Gates will testify and the evidence will show that he
6 actually wrote that Rules Violation Report the day of or the
7 next day, shortly thereafter the incident occurred.

8 The reason Mr. Perez did not receive the Rules Violation
9 Report until later is because it goes through several steps.
10 There are checks by Mr. Gates's supervisor, and there are other
11 procedures before Mr. Perez receives the Rules Violation
12 Report.

13 After Mr. Perez and Mr. Guerrero finally complied with
14 orders, the defendants will testify that he searched the cell
15 following standard procedure. Mr. Guerrero and Mr. Perez were
16 placed in handcuffs and removed from the cell.

17 Officers Pimentel, Gates, Gongora and Healy were there, at
18 Mr. Perez's cell. They then searched Mr. Perez's cell for any
19 gang items, gang-related material or other contraband that
20 might be in the cell.

21 You are going to hear that they did a thorough search.
22 That means that they searched the light fixtures and the walls
23 for any hidden items. They searched through all of Mr. Perez's
24 clothes. They had to search through his bedding and check the
25 mattress for anything hidden in there.

1 You will hear that standard procedure is for them to place
2 the clothes and the bedding and the mattress, to leave them on
3 the bed in the cell. However, you will also hear -- and you
4 will also hear that they did not trash Mr. Perez's cell, and
5 they followed standard procedure during the cell search.

6 You are going to hear that one of these officers removed
7 notes from the toilet. These are the notes that Mr. Guerrero
8 had torn up and placed into the toilet. You are also going to
9 hear that they followed standard procedure when they took
10 paperwork and other property from Mr. Perez's cell so that it
11 could be reviewed later by Officers Burris and Pimentel.

12 The reason why the evidence -- the evidence will show that
13 the reason they took this paperwork from Mr. Perez's cell is so
14 that it could be reviewed at another location, and Mr. Perez
15 would not have to be left out of his cell for an extended
16 period of time.

17 You are also going to hear that the defendants' memory of
18 this incident is not perfect. They have all conducted hundreds
19 of cell searches as gang investigators. They have all
20 conducted -- going to hear that they have all conducted dozens
21 of cell searches where they witnessed inmates trying to destroy
22 evidence or paperwork in the toilets of the cell.

23 Some of these officers will remember the incident better;
24 some will remember the incident worse. The incident occurred
25 over three years ago, so they will tell you that everything is

1 not perfectly clear in their memory.

2 You will also hear testimony from Mr. Perez, his cellmate
3 Mr. Guerrero, and an inmate in the cell next-door to them,
4 Mr. Mendoza. The evidence will show that these inmates had all
5 been validated as members of the Mexican Mafia. The evidence
6 will show that these inmates were all friends, and that
7 Mr. Perez had helped Mr. Guerrero and Mr. Mendoza out with
8 legal work in the past.

9 These inmates will -- may testify that officers made some
10 comments disparaging his lawsuit and other comments regarding
11 lawsuits when they searched the cell. But you are also going
12 to hear testimony from the officers. And they are going to
13 testify that they didn't make these comments, and that they
14 wouldn't make comments such as those because they hold
15 themselves to a high standard.

16 Now I'm going tell you a little bit about what happened
17 after the cell search was completed. Mr. Perez was returned to
18 his cell. Officers Burris and Pimentel then reviewed the
19 paperwork that had been taken from Mr. Perez's cell. And they
20 confiscated pictures and an address book from that paperwork,
21 along with some other contraband such as magazines that were
22 over the limit for how many Mr. Perez could have in his cell.

23 You are going to hear that they then returned all of the
24 other paperwork to Mr. Perez. You are going to see evidence
25 that they provided Mr. Perez a receipt at the time that they

1 returned this paperwork to Mr. Perez. The receipt listed all
2 of the items that they confiscated from Mr. Perez. And the
3 receipt also noted that all other paperwork had been returned
4 to Mr. Perez.

5 Mr. Perez was then given the opportunity to sign that
6 receipt, acknowledging that had he received his property back.

7 You will hear that a couple weeks later, Mr. Perez filed
8 what is called an inmate appeal. This is a procedure that
9 inmates have to complain about actions of officers or file
10 other complaints with the prison. You are going to hear that
11 Mr. Perez requested some of his property back in this appeal.
12 You are going to hear that he specifically requested pictures
13 and an address book which officers -- which Officer Burris
14 acknowledges were confiscated from Mr. Perez.

15 But you are also going to hear that Mr. Perez did not
16 specifically request the return of any articles, or a legal
17 document which he now claims were confiscated at the time.

18 In summary, the evidence is going to show a few important
19 things: That Officers Burris and Pimentel were ordered to
20 provide Mr. Perez a new gang validation. They were informed
21 that this was because of Mr. Perez's previous lawsuit. And
22 that it was standard procedure for them to review Mr. Perez's
23 paperwork, and to conduct a cell search in order to find any
24 future -- any additional evidence regarding Mr. Perez's gang
25 activities.

1 You are going hear that during the cell search, Officer
2 Gates and other officers saw Mr. Guerrero putting notes into
3 the toilet. And that it is standard procedure to issue
4 Mr. Guerrero a Rules Violation Report for that conduct.

5 You are also going to hear that officers witnessed
6 Mr. Perez interfering with their view of Mr. Guerrero, and --
7 sorry. And encouraging Mr. Guerrero to continue destroying the
8 property.

9 You are going to hear that issuing Mr. Perez and
10 Mr. Guerrero a Rules Violation Report for this conduct is
11 standard procedure.

12 The evidence will show that these officers did not
13 confiscate articles or legal documents from Mr. Perez. The
14 evidence will show that these officers did not trash
15 Mr. Perez's cell. And the evidence will show that these
16 officers did not issue Mr. Perez a Rules Violation Report
17 because of any desire to keep him in the Security Housing Unit
18 or because of Mr. Perez's previous lawsuit.

19 Please listen carefully to all of the evidence. Mr. Perez
20 has the burden of proof by a preponderance of the evidence.
21 You will see that Mr. Perez cannot prove his case. And at the
22 end of -- at the end of listening to all of the evidence, my
23 colleague Jennifer Nygaard will be asking to you return a
24 verdict for the Defendants.

25 Thank you.

1 **THE COURT:** Thank you. So we will now take a -- you
2 know what, it's a quarter to 2:00. And instead of -- because
3 Kristen has to spend some time orienting you in the back to the
4 jury room and to the procedures and everything, I think if we
5 start with our first witness today, we are barely going to be
6 able to get any testimony in.

7 So I think it would be better in the interest of my
8 promise to you that you will always be out of here by 2:00, and
9 no later than 2:30, we will stop for the day.

10 And Kristen will take you back, show you the jury room,
11 give you your badges, exchange contact information with you,
12 answer any questions you may have about the logistics of all of
13 this.

14 Meanwhile, though, let me remind you -- I know it wasn't
15 that long ago that I gave you the instructions, but let me just
16 remind you of some of the most important aspects of them.

17 Don't have any conversations with anybody about what you
18 have seen or heard so far, other than that you are in jury
19 duty, and you have an estimate of how long it is going to last
20 and when you are going to be available and when you are not
21 going to. This is very important.

22 And don't -- and if anybody tries to communicate with you,
23 let us know right away. And with that, I'll let Kristen take
24 you back to the jury room and start showing you around.

25 (Jury exits the courtroom at 1:42 p.m.)

1 **THE COURT:** All right. I just thought it would be
2 better -- rather than having Mr. Perez testify for five minutes
3 or 10 minutes, I thought it would be better to just call it a
4 day.

5 Tomorrow is the plan to call the two witnesses from
6 Pelican Bay first, get that out of the way, to make sure we
7 sort of plow through any potential technical glitches and
8 whatnot?

9 **MR. LEE:** Your Honor, our plan is to -- after
10 Mr. Perez, to call one of the defendants first. And then
11 Mr. Mendoza and Mr. Guerrero.

12 **THE COURT:** My concern about that, I don't know how
13 long you anticipate Mr. Perez and one of the defendants will
14 testify. But we've got -- we've got this lined up for the
15 prisoners to testify from Pelican Bay on Tuesday, right? I
16 mean, that's how it's -- that's how it's been set up.

17 **MR. LEE:** Right.

18 **THE COURT:** How confident are you that those other
19 two defendants will be able to complete their defendant in
20 enough time for the two folks at Pelican Bay to give their full
21 testimony?

22 **MR. LEE:** Well, I guess a lot depends on how long the
23 cross examination from Ms. Nygaard. We'll defer to the Court.

24 I understand the Court -- it's a priority that the two
25 prisoners testify tomorrow. So if the Court wants to be

1 absolutely positive that we get through them tomorrow, then --

2 **THE COURT:** I think we should do that. I think at a
3 minimum, you know -- I don't know if you really want Mr. Perez
4 to go first, but at a minimum, the folks up at the prison
5 should probably be the second and the third witnesses.

6 Do you folks feel confident that we'll be able to get done
7 by Tuesday? I imagine so, but...

8 **MR. LEE:** Certainly should, from our perspective.

9 **MS. NYGAARD:** Yes. We had told the prison that the
10 witnesses would be called around -- like shortly after lunch,
11 because that's what we had discussed last Friday when we were
12 here.

13 **MS. MORAN:** We didn't confirm. I said we would
14 discuss it internally.

15 **MS. NYGAARD:** They can come at any point in time, but
16 the prison needs some advance notice to get the guys down into
17 the video conference room for their testimony. So I think --
18 you know, if we can figure out now so I can let the prison know
19 tonight what time approximately the witnesses will be called.

20 **THE COURT:** Okay, let me ask the question another
21 way, then. If they -- if they get called after lunch, are we
22 confident that we can get them done by, you know, around --
23 let's say we call them at 12:45. Are they going to be done by
24 2:00 o'clock?

25 **MR. LEE:** I think so, yes.

1 **MS. NYGAARD:** I think so.

2 **MR. LEE:** Yeah, we anticipate short testimony.

3 **THE COURT:** Why don't we just plan, regardless of
4 where we are at the lunch break, if one of the witnesses is in
5 the middle of his testimony we'll interrupt that testimony and
6 call the two witnesses from Pelican Bay immediately after
7 lunch.

8 **MS. NYGAARD:** And they are at actually two different
9 prisons, which adds a little twist. So, I think you wanted to
10 call Guerrero first.

11 **MR. BENEDETTO:** Yes.

12 **MS. NYGAARD:** Guerrero is at Pelican Bay. I will
13 then let them know that maybe around 12:30-ish.

14 **MR. LEE:** I suppose theoretically it could even be
15 before lunch, right? If we're definitely going to call
16 Mr. Guerrero second, you know, Mr. Perez, I think we estimate
17 his direct to be maybe two and a half hours. I don't know how
18 long you plan to cross him for, but...

19 **THE COURT:** Well, I think -- I think you should
20 tell -- I think you should create a cushion here, right? So
21 tell -- sorry, the witness from Pelican Bay is the first one
22 that you want to call?

23 **MR. BENEDETTO:** Yes.

24 **THE COURT:** Tell them to have him ready by noon.

25 **MS. NYGAARD:** Yeah.

1 **THE COURT:** And tell them to have the second witness
2 ready by 12:15 or something like that, or 12:30. Just to make
3 sure that if -- you know, if they have to -- you know, if they
4 have to sit around for a little while, that's okay. What would
5 be a problem is the jury sitting around or us going past 2:30.

6 So just tell Pelican Bay to have the witness ready by
7 noon, and tell -- where's the other prisoner?

8 **MS. NYGAARD:** Kern Valley State Prison.

9 **THE COURT:** Tell them to have him ready by 12:30.

10 **MS. NYGAARD:** Okay.

11 **THE COURT:** Regarding these photographs, you know, we
12 spent some time poking around in the law on this issue, and we
13 couldn't really find anything directly on point. I mean, if
14 Mr. Perez had taken the photos or if you had a witness who
15 was --

16 **MR. BENEDETTO:** Your Honor?

17 **THE COURT:** Sorry. Go ahead. You look like you want
18 to say something.

19 **MR. BENEDETTO:** Your Honor, sorry if I cut you off.

20 **THE COURT:** No, that's okay.

21 **MR. BENEDETTO:** We have -- not Ninth Circuit, we have
22 out of circuit authority out of the Fifth Circuit and some
23 treatise secondary source to suggest in the absence of a
24 photographer being present a person who can lay the foundation
25 as to the photograph showing a fair and accurate depiction of

1 what the photograph shows is enough to authenticate under 901.

2 **THE COURT:** We saw that Fifth Circuit case, too. But
3 was that -- okay. So it wasn't the person taking the picture.
4 But wasn't it a picture of the actual thing being testified
5 about?

6 I mean, in other words, here you've got a picture of
7 something that looks like the thing the witness is testifying
8 about. And I'm not 100 percent sure if that should matter, but
9 I think that's a different -- as I recall correctly, that's a
10 difference from the Fifth Circuit case. And I -- you know, I
11 mean, I'll sort of buy that.

12 If it's a picture of the Golden Gate Bridge, right, and
13 somebody is testifying about --

14 **MR. BENEDETTO:** Isn't that self-authenticating?

15 **THE COURT:** Yeah, for now. But, you know, this is a
16 picture of something that resembles the thing the witness is
17 testifying about. And so that seems -- it does seem like one
18 level removed.

19 (Discussion held off the record between plaintiff's
20 counsel.)

21 **MR. BENEDETTO:** Your Honor, the report. The photos,
22 to my knowledge, have been pulled from the Ashker expert
23 report. So it -- it wasn't sort of indiscriminately pulled.

24 **THE COURT:** Who's Ashker?

25 **MR. BENEDETTO:** The case that was settled recently

1 involving Pelican Bay and long-term solitary confinement.

2 These photos weren't indiscriminately pulled.

3 Again, our client can lay the foundation, we believe,
4 particularly as to the exercise yards. And we believe that --
5 yeah.

6 **THE COURT:** Does it matter when -- how much do you
7 care about whether they are demonstratives versus actual
8 exhibits?

9 **MR. BENEDETTO:** I mean, we -- we believe it's -- I
10 mean, certainly we believe, at least, it should be a
11 demonstrative. But we certainly feel that in evaluating the
12 chilling effect element, the magnitude of the threat, that it
13 would be important for the jury to have those exhibits with
14 them.

15 **THE COURT:** Okay. I'm going to think about it a
16 little bit further. I am sort of tentatively inclined to allow
17 those photographs to be used. And I'll think a little more
18 about whether it should be demonstrative or actually -- actual
19 exhibit.

20 But I'm you know, sort of -- you're going to have to sort
21 of plan for both scenarios, but I'm tentatively inclined to
22 think that it -- it's slightly weird, but that would it be
23 appropriate to use the photos to assist Mr. Perez in providing
24 his testimony.

25 Is there anything else we need to discuss right now?

1 **MS. NYGAARD:** Yes, your Honor. I was -- defendants
2 are wondering if the jury instructions are going to be coming
3 out before Perez's testimony tomorrow? Specifically the jury
4 instruction on retaliation and the chilling effect.

5 **THE COURT:** Remind me your -- remind me the issue
6 that it goes straight to Mr. Perez's testimony, that it would
7 affect how Mr. Perez actually testifies.

8 **MS. NYGAARD:** Well, it would go -- could go to our
9 cross examination of whether -- of whether he continued to
10 exercise his First Amendment rights after the cell search, if
11 it's going -- if we can take into account the -- if the jury
12 can take into account for the chilling effect not just a
13 prisoner of ordinary firmness, but also what Mr. Perez had
14 continued to do.

15 **THE COURT:** I'll provide you some guidance on that.
16 I mean, my -- my -- I had been thinking about it up to this
17 point as a legal issue, and what the jury needs to decide. And
18 we had some argument about this at motion in limine. But what
19 I concluded -- I don't think there is really much dispute about
20 it -- is that the test is how the conduct would affect a person
21 of ordinary firmness.

22 But what you are saying is that what -- the fact that it
23 didn't chill Mr. Perez is probative of the impact that it would
24 have on a person of ordinary firmness.

25 **MS. NYGAARD:** Correct.

1 **THE COURT:** They can argue that Mr. Perez is a person
2 of extraordinary firmness, and you can argue: No, it's
3 probative of how a person of ordinary firmness would react.
4 You're just saying it's probative on that point.

5 **MS. NYGAARD:** Yes. That is defendants' position.

6 **THE COURT:** All right. I'll get you some guidance on
7 that before the end of the day.

8 **MS. NYGAARD:** Okay. Thank you.

9 And then a matter that we did not discuss earlier today.
10 Defendants would be making a motion to exclude non-party
11 witnesses during testimony. Specifically, Richard Subia is the
12 only witness they have that I would be asking to have not
13 present in the courtroom during other testimony.

14 **THE COURT:** Okay. Is Mr. Subia -- has Mr. Subia been
15 in the courtroom?

16 **MS. NYGAARD:** I don't think so. I'm just -- in
17 advance of tomorrow.

18 **THE COURT:** Okay. You don't oppose that motion.

19 **MR. LEE:** No.

20 **THE COURT:** Motion granted.

21 Anything else?

22 **MR. LEE:** Nothing from us, your Honor.

23 **MS. NYGAARD:** No.

24 **THE COURT:** Okay. We'll see you tomorrow. I'll be
25 in at about 8:00 o'clock to discuss -- to be available to

1 discuss anything that you need, but like I said, we'll issue
2 some guidance on the firmness issue today. All right?

3 Thank you.

4 **MR. LEE:** Okay. Thank you, your Honor.

5 **MR. BENEDETTO:** Thank you.

6 **MS. NYGAARD:** Thank you.

7 **THE CLERK:** Court is in recess.

8 (Whereupon at 1:55 p.m. further proceedings were
9 adjourned until Tuesday, November 17, 2015 at
10 8:00 a.m.)
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CERTIFICATE OF REPORTER

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Belle Ball

Belle Ball, CSR 8785, CRR, RMR, RPR

Monday, November 16, 2015